No. 88-5050-CSY
Status: GRANTED

Title: Daniel Holland, Petitioner
v.
Illinois

Docketed:
June 3, 1988

Court: Supreme Court of Illinois

Counsel for petitioner: Honchell,Donald S.

Counsel for respondent: Hartigan,Neil, Daley,Richard M., Fryklund,Inge

Entry	Date	Note	Proceedings and Orders
1	Jun 3 1988	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Aug 18 1988		DISTRIBUTED. September 26, 1988
4	Aug 23 1988	F	Response requested -- WJB.
5	Sep 9 1988	X	Brief of respondent Illinois in opposition filed.
6	Feb 21 1989		REDISTRIBUTED. February 24, 1989
8	Feb 27 1989		Petition GRANTED.
			**********
10	Apr 8 1989		Order extending time to file brief of petitioner on the merits until April 29, 1989.
11	Apr 11 1989		Brief amici curiae of ACLU, et al. filed.
12	Apr 26 1989		Joint appendix filed.
14	Apr 29 1989		Brief of petitioner Daniel Holland filed.
13	May 8 1989		Record filed.
		*	6 vol from ILSC
16	May 30 1989		Order extending time to file brief of respondent on the merits until June 19, 1989.
17	Jun 14 1989		Order further extending time to file brief of respondent on the merits until June 23, 1989.
18	Jun 23 1989		Brief of respondent Illinois filed.
19	Jul 13 1989		CIRCULATED.
20	Jul 20 1989		SET FOR ARGUMENT WEDNESDAY, OCTOBER 11, 1989. (4TH CASE)
21	Jul 22 1989	X	Reply brief of petitioner Daniel Holland filed.
22	Oct 11 1989		ARGUED.

No 88 5050

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

ORIGINAL

DANIEL HOLLAND,

Petitioner

vs

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

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No.,

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

DANIEL HOLLAND,

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vs

THE PEOPLE OF THE
STATE OF ILLINOIS,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

Petitioner Daniel Holland respectfully prays a writ of certiorari issue to review the decision of the Supreme Court of Illinois affirming his convictions and sentences of imprisonment.

(a)

QUESTIONS PRESENTED FOR REVIEW

1. The first question for review in this case is whether the State's use of peremptory challenges to remove black prospective jurors on grounds of race violates the Sixth Amendment right to trial by jury.

2. The remaining question for consideration is whether petitioner, a white man, has standing to challenge as violative of that constitutional right the removal by the prosecutors of black prospective jurors from the jury in petitioner's case.

(b)

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(d)

OPINION BELOW

The decision of the Illinois Supreme Court involving petitioner Daniel Holland is published as People Daniel Holland at 121 Ill.2d 136, 520 N.E.2d 270 (1988). A copy of the opinion is included as an appendix to this petition.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1257(3). The opinion of the Supreme Court of Illinois was filed on December 21, 1987. A petition for rehearing was submitted and was denied on April 5, 1988. This petition is being presented within 60 days of the date on which the Illinois Supreme Court denied rehearing.

(f)

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(g)

STATEMENT OF THE CASE

Among the 30 (Supp.R.II 3) or 40 (Supp.R.II 5) prospective jurors summoned for service were two blacks, Miss Conley and Mr. Virgil Mosley. (Supp.R.II 5)

During her examination by the judge, Miss Conley related she resided in Chicago and had lived at her current address for 6 years. She lived with her parents and had graduated recently from Northeastern University with a Bachelor of Science degree. (R. 529-30) Both parents worked at the Rockford Paper Mills, her father in maintenance and her mother packing boxes. She had never been a juror and did not know the lawyers or the defendant. Nor had she heard or read anything about the case. She did not have friends or relatives in the State's Attorney's Office or on any police force. Neither she nor any family member nor a close friend had ever been the victim of a crime. (R. 530) Nothing about the nature of the charges would in any way prevent her from rendering a fair and impartial verdict in the case if selected as a juror. (R. 530-1) Miss Conley had no bias or prejudice against a person because charged with a crime. She knew of no reason whatsoever why she could not render a fair and impartial verdict if accepted as a jury member. (R. 531)

Mr. Mosley lived in Chicago and had resided at his current address for 3 months. He had lived at his previous address in Chicago for 11 years. He lived with his wife and worked as an inventory clerk for Polk Brothers. He had been employed there for 2 months and, before that, had attended Northeastern University for one semester. (R. 559-60) His wife worked in a clerical capacity for Allstate Insurance and

had been so employed for a year and a half. He knew neither the lawyers nor the defendant and had not read or heard about the case. He had no friends or relatives in the State's Attorney's Office or on a police force. (R. 560) He was not biased or prejudiced against a person because charged with a crime (R. 560-1) and there was nothing about the nature of the charges that would cause him to feel he could not be fair and impartial. A friend of his had been a murder victim in Chicago 3 weeks previously but there was nothing about the incident that could prevent him from being fair and impartial. He had never been accused of a crime and neither had a friend or any members of his family. (R. 561) He could think of no reason why he could not render a fair and impartial verdict if selected as a juror. (R. 561-2)

Immediately following the court's inquiries of Miss Conley, the State excused the black prospective juror by use of a peremptory challenge. (R. 531) Without seeking any additional information or a clarification of any answer, the State equally used a peremptory challenge to exclude black prospective juror Virgil Mosley. (R. 565)

Defense counsel subsequently objected to the exclusion by the State through peremptory challenge of both available black prospective jurors. (R. 584-7) When argument was heard, counsel repeated his protest of the exclusion of blacks from jury duty by the State on peremptory challenge. (Supp.R.II 3, 6-10) The State responded the removal "was not based upon their race" and this "was not the intent of the State in doing so." (Supp.R.II 5) To this, counsel retorted the prosecutor "did not

even consider what their background might be when he used his two challenges. It would only lead the defense to conclude that these black jurors were eliminated simply because of their race and not any specific bias." (Supp.R.II 10) The judge rejected defendant's arguments of error by the State in using peremptory challenges to remove the only available black prospective jurors. (Supp.R.II 12-15)

On appeal to the Illinois appellate court, the panel recognized argument on this issue was influenced by the "controlling" authority of Batson v. Kentucky, 476 U.S. 79, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986) forbidding the State from using its peremptory challenges to remove blacks from jury duty on grounds of race. The appellate court did not, however, rule on the matter, given the retrial it ordered on other grounds, assuming it would be "highly unlikely" the issue would recur. (People v. Daniel Holland, 147 Ill.App.3d 232, 327 (1986))

Having accepted the cause for review on appeal by the State, the Illinois Supreme Court declined to acknowledge the commission of any error in striking the two black prospective jurors by State peremptory challenge. In its decision (People v. Holland, 121 Ill.2d 136 (1988)), the Supreme Court of Illinois concluded petitioner, a white man, had no standing to challenge the removal of the blacks. It first refused to apply the Batson holding since petitioner's race did not match the race of those removed by the State. (121 Ill.2d at 157) And it then refused to find applicable to this situation the constitutional protection under the Sixth Amendment of the right to trial by jury. (121 Ill.2d at 158) Petitioner was therefore afforded no relief from the State's use of peremptory challenges to exclude the available black prospective jurors from service on his jury.

RAISING THE FEDERAL CONSTITUTIONAL CLAIMS

Counsel for petitioner argued in the trial court the State's use of peremptory challenges to strike the available black prospective jurors violated petitioner's Sixth Amendment right to trial by jury. Counsel contended petitioner "has a right to be - - to a jury to be drawn from a representative cross section of the community and be tried by a representative cross section of the community." (Supp.R.II 3-4) He stressed his "client is entitled to a representative cross section of the community." (Supp.R.II 4) He relied on Taylor v. Louisiana, 419 U.S. 522 (1975) "which extended to the State through the Fourteenth Amendment the representative cross section requirements of the Sixth Amendment." (Supp.R.II 6) And counsel emphasized petitioner "has an identical protection under the Sixth Amendment against the systematic removal of blacks from the venire." (Supp. R.II 7) Counsel concluded "the prospective jury, so far, has not been a representative cross section of the community and my defendant's Sixth Amendment right to a jury trial has been violated". (Supp.R.II 10)

On appeal to the Illinois appellate court, the panel considered, but did not decide, the issue of petitioner's "right to a jury drawn from a fair cross-section of the community". (People v. Holland, 147 Ill.App.3d 323 at 326 (1986)) And in the Illinois Supreme Court, petitioner argued "the exclusion of the only two black prospective jurors in the jury array violated his sixth amendment right to trial by a jury representing a fair cross-section of the community." (People v. Holland, 121 Ill.2d 136, 158 (1988)) Facing that argument, the Illinois Supreme Court decided there was no violation of the Sixth Amendment.

REASONS FOR GRANTING THE WRIT

I.

THE STATE'S USE OF PEREMPTORY CHALLENGES TO REMOVE BLACK PROSPECTIVE JURORS ON GROUNDS OF RACE VIOLATES THE SIXTH AMENDMENT RIGHT TO TRIAL BY JURY

The issue of whether the use of peremptory challenges by the government to exclude black potential jurors on grounds of race violates the Sixth Amendment is one currently on review by this Court. Consequently, this Court should accept petitioner's case as well and apply to him a determination that such utilization of peremptory challenges denied him his constitutional right to trial by jury.

In Teague v. Lane, No. 87-5259, petitioner addressed the question of whether the fair cross-section requirement of the Sixth Amendment bars the prosecution from using peremptory challenges in a racially discriminatory fashion by excusing black prospective jurors due to race. This Court granted review of that issue (and others) (see 42 CrL 4197-8, 42 CrL 4184) and its resolution of the matter should extend to petitioner's case since it raises the same legal question.

Petitioner as well argued below that his right to trial by jury as contemplated by the Sixth Amendment was violated by the State's removal of the black prospective jurors on grounds of race. The Illinois Supreme Court refused to agree, finding the Sixth Amendment did not cover that situation. If this Court in Teague disagrees and finds the Sixth Amendment does apply, petitioner should benefit. He requests this Court, therefore, accept his cause for disposition on the basis of its holding in Teague v. Lane.

Upon deciding in Teague that the Sixth Amendment does

bar removal of black potential jurors by State use of peremptory challenges on grounds of race (see Roman v. Abrams, 822 F.2d 214, 224-7 (2nd Cir. 1987) upholding McCray v. Abrams, 750 F.2d 1113 (2nd Cir. 1984); Booker v. Jabe, 801 F.2d 871 (6th Cir. 1986) reinstating Booker v. Jabe, 775 F.2d 762 (6th Cir. 1985) cert. denied Michigan v. Booker, - U.S. - , 93 L.Ed.2d 860, 107 S.Ct. 910 (1987); Fields v. People, 732 P.2d 1145, 1146, 1155 (Colo. 1987); United States v. Mosely, 810 F.2d 93, 96 (6th Cir. 1987); State v. Wagster, 489 So.2d 1299, 1303 (La.App. 1986)), it should equally conclude the law was violated in petitioner's case. This Court should similarly protect petitioner's Sixth Amendment right to trial by jury by accepting his cause and concluding, contrary to the Illinois Supreme Court, that the State's peremptory removal of the available black prospective jurors does present a constitutional violation of the Sixth (and Fourteenth) Amendment.

II.

PETITIONER, A WHITE MAN, DOES HAVE STANDING TO CHALLENGE AS VIOLATIVE OF THAT CONSTITUTIONAL RIGHT THE REMOVAL BY THE PROSECUTORS OF BLACK PROSPECTIVE JURORS FROM THE JURY IN HIS CASE

An aspect of the Teague case accepted for review which arises in this case but is not present there is the fact that the races of petitioner and the excluded jurors is different. In Teague, the accused is black, as are the prospective jurors removed by the State. (See 42 CrL 4197 (no constitutional violation "to exclude black jurors from jury for accused black's trial"); Teague v. Lane, 820 F.2d 832, 833 (7th Cir. 1987).) In this case, however, petitioner is white while the excused jurors are black. This Court should accept this case to consider whether a

member of one race may challenge as violative of the Sixth Amendment removal of jurors of another race. Court decisions on the issue indicate, based on a holding by this Court, that a white man does have standing to contest the use of peremptory challenges to remove members of the black race on racially discriminatory grounds.

This Court addressed the matter of a challenge by a white defendant to the exclusion of blacks from jury service in Peters v. Kiff, 407 U.S. 493, 33 L.Ed.2d 83, 92 S.Ct. 2163 (1972). In that case, this Court recognized

> "the exclusion of a discernible class from jury service injures not only those defendants who belong to the excluded class, but other defendants as well, in that it destroys the possibility that the jury will reflect a representative cross section of the community." (33 L.Ed.2d 83 at 92)

This Court agreed

> "a State cannot, consistent with due process, subject a defendant to...trial by a jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution and laws of the United States. Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process. They create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well." (33 L.Ed.2d at 94)

And it refused to limit its fears from unconstitutional jury selection procedures to cases where the accused and the jurors were members of the same race. (33 L.Ed.2d 83, 94) Instead, it held

> "that whatever his race, a criminal defendant has standing to challenge the system used to select his...petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law." (33 L.Ed.2d at 95)

Subsequent cases have adhered to this Court's views in Peters.

In State v. Wagster, 489 So.2d 1299, 1303 (La. App. 1986), the court relied on Peters to find that, although the defendant is white, he had standing to challenge the removal of black jurors. Likewise, in Seubert v. State, - S.W.2d - (Nos. 01-86-00057-CR etc., Tex.Ct.App., 1st Dist., April 11, 1988), 43 CrL 2089, the reviewing court accepted the challenge by a white defendant to removal of a black prospective juror as proper under Peters v. Kiff and Taylor v. Louisiana, 419 U.S. 522 (1975). (See also Fields v. State, 732 P.2d 1145 (Colo. 1987) allowing a challenge on Sixth Amendment grounds by black defendants to State removal of potential jurors with Spanish surnames.) Petitioner here as well should be deemed entitled to object to the State's use of peremptory challenges to exclude the black potential jurors, even though his race differs.

The issue of the impact of a difference in race between the accused and the excluded juror is not included in the questions facing this Court in Teague v. Lane. This Court should accept this opportunity to consider the matter and thereby guide lower courts in dealing with challenges to members of another race. For this additional reason, petitioner requests this Court grant his petition and determine he may legally raise a challenge to the use of peremptory strikes to excuse jurors of another race since violative of his Sixth Amendment right to trial by jury (as applied through his right to due process under the Fourteenth Amendment).

CONCLUSION

For the reasons stated herein, petitioner Daniel Holland respectfully prays that this Honorable Court issue a writ of certiorari to review the judgment concerning him entered in these proceedings by the Illinois Supreme Court.

Respectfully submitted,

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APPENDIX

Docket No. 64182—Agenda 11—May 1987.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. DANIEL HOLLAND, Appellee.

R 6935
Holland

JUSTICE MORAN delivered the opinion of the court:

Defendant, Daniel Holland, was charged by indictment with two counts of aggravated kidnaping (Ill. Rev. Stat. 1979, ch. 38, pars. 10—2(a)(3),(a)(5)); two counts of rape (Ill. Rev. Stat. 1979, ch. 38, par. 11—1); two counts of deviate sexual assault (Ill. Rev. Stat. 1979, ch. 38, par. 11—3); one count of armed robbery (Ill. Rev. Stat. 1979, ch. 38, par. 18—2); and one count of aggravated battery (Ill. Rev. Stat. 1979, ch. 38, par. 12—4(b)(1)). These charges stemmed from the sexual assault of a female suburban Cook County teenager. The indictment also charged the defendant with two counts of aggravated battery as a result of a confrontation with two police officers after his arrest (Ill. Rev. Stat. 1979, ch. 38, par. 12—4(b)(6)) and one count of unlawful use of weapons within five years of release from a penitentiary (Ill. Rev. Stat. 1979, ch. 38, pars. 24—1(a)(9),(b)). On defendant's motion, the court severed the counts charging aggravated battery of a police officer and the count charging unlawful use of weapons. Trial proceeded before a jury in the circuit court of Cook County on the remaining counts of the indictment.

Defendant was found not guilty of aggravated battery but was found guilty of aggravated kidnaping, rape, deviate sexual assault, and armed robbery. The court entered judgment on the verdicts and held a sentencing hearing to consider factors in aggravation and mitigation. At the conclusion of the hearing, the court found "that the offenses of rape, deviate sexual assault and aggravated kidnapping were 'accompanied by exceptionally brutal [or] heinous behavior indicative of wanton cruelty.'" (Ill. Rev. Stat. 1979, ch. 38, par. 1005—5—3.2(b)(2).) The court then sentenced the defendant to extended terms of 60 years' imprisonment for rape and deviate sexual assault (Ill. Rev. Stat. 1979, ch. 38, par. 1005—8—2(a)(2)) and an extended term of 30 years' imprisonment for aggravated kidnaping (Ill. Rev. Stat. 1979, ch. 38, par. 1005—8—2(a)(3)). These sentences were to run concurrently. As to the conviction for armed robbery, the court made a "separate and distinct" finding that the defendant's objectives changed during the course of the kidnaping from sexual gratification to armed robbery and that the sexual assault was completed before the armed robbery occurred. The court further found that this conviction was the defendant's fifth conviction for armed robbery and that society required protection from the defendant. On the basis of these findings, the court imposed a term of 25 years' imprisonment for armed robbery and ordered that it be served consecutively to the extended term sentences already imposed. (Ill. Rev. Stat. 1979, ch. 38, pars. 1005—8—4(a), (b).) The court further ordered that "[a]ll of these sentences shall be served consecutive to any parole violations."

FILED
DEC 21 1987
CLERK SUPREME COURT
ILLINOIS

Defendant appealed, raising numerous errors but principally contending that an inculpatory statement made during his post-arrest interrogation by an assistant State's Attorney violated his *Miranda* rights (*Miranda v. Arizona* (1966), 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602) and should have been suppressed. A divided appellate court agreed, concluding that defendant's waiver of his *Miranda* rights was invalid because he was not informed, prior to receiving his rights and giving an inculpatory statement, that an attorney was attempting to see him. The majority of the court also held that defendant's statement was inadmissible because it was the product of a police "subterfuge." (147 Ill. App. 3d 323, 337-38.) We granted the State's petition for leave to appeal pursuant to Supreme Court Rule 604(a) (103 Ill. 2d R. 604(a)).

The central issue presented is the validity of defendant's waiver of his *Miranda* rights. We also consider the following issues raised by the defendant: (1) that the State used its peremptory challenges to exclude black jurors in violation of *Batson v. Kentucky* (1986), 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712; (2) that his trial counsel was ineffective; (3) that his conviction for armed robbery was improper because the State failed to prove that he took the complainant's property by force or threat of force; (4) that imposition of extended term sentence for aggravated kidnaping was improper; and (5) that imposition of consecutive sentences was improper. We first summarize the facts pertinent to these issues.

Testimony presented at the hearing on defendant's motion to suppress various post-arrest incriminating statements established that the defendant was the object

of a traffic stop at approximately 8 a.m. on May 4, 1980, by a Schiller Park police officer because the vehicle he was driving did not have a rear license plate. The officer ordered a check of defendant's driver's license and found that it had been revoked. While awaiting the results of the driver's license check, the officer noticed that defendant's vehicle—a dark blue Chevrolet Camaro, his clothing—blue jeans, a jean jacket, a white T-shirt bearing the word "Superscrew," and his physical appearance matched information contained in a reported abduction which occurred in Des Plaines, Illinois, at approximately 6 a.m. on May 4, 1980.

Defendant was arrested for improper vehicle registration, driving on a revoked license, and illegal transportation of alcohol. At the time of his arrest, a straight blade hunting knife was removed from his back pocket. Defendant was transported to the Schiller Park police station and, in a subsequent search, the complainant's high school identification card was found in a pocket of defendant's jacket. Also found in this search was $58.80 in currency and coins.

Schiller Park police then contacted Detective John Meese of the Des Plaines police regarding the arrest of the defendant. Detective Meese asked that the defendant be photographed and held pending further investigation. Detective Meese obtained the defendant's photograph from the Schiller Park police and presented it along with six others to the complainant. After she identified the defendant's picture as representing her assailant, Meese made arrangements to transport the defendant to the Des Plaines station. Prior to moving the defendant, Meese spoke by telephone to Anthony Rocco, who represented himself as defendant's attorney. According to Meese, Rocco asked to be notified if the defendant was to be placed in a lineup. Meese testified that he telephoned Rocco later that afternoon and left a message that the defendant would be in a lineup.

Meese transported the defendant to the Des Plaines station. Upon arriving, Meese advised him of his *Miranda* rights and was present during an interview conducted by Assistant State's Attorney Ira Raphaelson, accompanied by Assistant State's Attorney Howard Freedman. The interview began at approximately 2:05 p.m. on the afternoon of May 4.

Meese heard Raphaelson give the defendant his

Miranda rights. About 20 minutes later, Raphaelson left the interview room, leaving the defendant and Detective Meese alone together. At this time, Meese told the defendant:

> "that we had received a report from the City of Chicago in reference to a female being raped in an alley. At that time his license plate was given as to the offending vehicle, and his vehicle was described as the same type vehicle.
>
> At that time I told him that the woman could not make a positive identification of him; however, he would have to explain why his vehicle was at that particular location."

Meese also testified that, in fact, he had not received such a report. However, Meese stated that the defendant responded by saying "he now wished to tell the truth."

Meese summoned Raphaelson and remained in the room during this second interview. He testified that he again heard Raphaelson advise defendant of his *Miranda* rights. During this interview, the defendant gave an oral inculpatory statement in which he admitted that he had picked up the complainant and her companion on Irving Park Road in Des Plaines; that he forced the companion from his car; that he forced the complainant to accompany him; that he forced her to perform two acts of fellatio and also raped her on two separate occasions. In addition, he admitted taking the complainant's money and her high school identification.

Meese stated that the defendant did not complain of any injuries when he arrived at the Des Plaines police station. He stated that he observed no physical or mental coercion of the defendant during the two interviews conducted by Raphaelson. Meese also indicated that the defendant acknowledged that he understood his *Miranda* rights and at no time requested an attorney.

Assistant State's Attorney Ira Raphaelson testified at the suppression hearing that he interviewed the defendant twice on May 4—once at approximately 2:05 p.m. and a second time at approximately 2:30 p.m.. Raphaelson stated that he began the first interview by introducing himself and telling the defendant that he represented the State and not the defendant. He then advised the defendant of his *Miranda* rights. According to Raphaelson, defendant indicated that he understood his rights and agreed to talk. Defendant proceeded to

give a false exculpatory statement in which he said that he had picked up a teenage girl and her boyfriend who were hitchhiking and that an argument ensued whereupon he ordered the two out of his car. The defendant explained his possession of the complainant's school identification card by saying that she had dropped it on the floor of his car, where he found it and placed it in the pocket of his jacket.

Raphaelson stated that he left the interview room. The defendant and Detective Meese remained inside with the door slightly open. Raphaelson stood about 10 feet from the door. He could not see the defendant, but he could see Meese, who was talking, presumably to the defendant. At approximately 2:30 p.m., Meese called him back into the interview room. Raphaelson reentered and again advised the defendant of his *Miranda* rights. Defendant again indicated that he understood his rights. He proceeded to give his oral incriminating statement.

Raphaelson testified that he then left the room and spoke to defendant's attorney, Anthony Rocco. According to Raphaelson, Rocco wanted to know what charges would be filed but did not ask to be present during any interviews or interrogations. Raphaelson also stated that, while he was aware that defendant's attorney had called the Des Plaines station, he was unaware of any request to speak with the defendant prior to any interviews. At approximately 4 p.m. on May 4, Raphaelson informed Rocco of the charges against the defendant.

Defendant's wife, Patricia Holland, also testified at the suppression hearing. She stated that a Schiller Park officer notified her around 8:30 a.m. on the morning of May 4, 1980, that her husband had been arrested for several traffic violations and that she should come to the station to post bond. Later that morning, she was informed that her husband was being held for the Des Plaines police, who were preparing other charges against him. Mrs. Holland was not told what charges were contemplated.

Mrs. Holland then contacted Anthony Rocco and requested that he represent her husband. She reached Rocco around 1 p.m. on May 4. During that afternoon, she spoke to him on several occasions. During each conversation, Rocco related his unsuccessful efforts to see the defendant. Mrs. Holland further testified that she met attorney Rocco at the Des Plaines station around

3:45 p.m. Shortly thereafter, Rocco was permitted to meet with the defendant.

The defendant testified at the suppression hearing, stating that he spoke to his wife by telephone around 8:30 a.m. on May 4, 1980. He was in the custody of the Schiller Park police. He stated that he told his wife to contact attorney Rocco so that he could arrange for the defendant's release.

Defendant further testified that, while in the custody of the Schiller Park police, an officer pulled his hair. As he resisted, defendant stated, his hands were handcuffed behind him and his "arms were elevated to where [he] couldn't stand on [his] feet. [He] was knocked to the ground, kicked, hit." The defendant also stated that he was punched with a 40-inch night stick "where I would be covered with clothing." As a result, defendant stated that he lost tufts of hair, that his ribs hurt, and that his right knee became swollen. He testified that he was hit repeatedly under his chin with a billy club while his "mug shot" was taken. When he resisted, he was knocked to the floor and beaten again. Defendant received no medical treatment while at the Schiller Park station.

Defendant further testified that he was mistreated by Detective Meese of the Des Plaines police after he arrived at the Des Plaines station. According to the defendant, between the first and second interview with Assistant State's Attorney Raphaelson, he was left alone with Meese. During this time, Meese jabbed him in the ribs for about 5 to 10 minutes. Meese then said that the defendant "better start answering questions or he was going to kick my ass." Shortly thereafter, Raphaelson returned. However, defendant did not tell Raphaelson about Meese's physical mistreatment or about his verbal threat. According to the defendant, he then told them "what [he] believed [they] wanted to hear." There followed an incriminating statement in which defendant admitted that he had picked up the complainant and her boyfriend; that he forced the boyfriend out of the car; that the forced the complainant to perform two acts of fellatio; that he raped her. Defendant stated that, throughout this entire period, no one advised him of his *Miranda* rights.

Defendant also testified that, after his arrival at the Des Plaines station, he repeatedly asked for an attorney.

Ultimately, he did see his attorney, Anthony Rocco, but not until he had given his inculpatory statement and had been placed in a lineup. When he did see his attorney, defendant told him of the physical mistreatment he had received. On May 5, defendant stated that he was taken to Cermak Hospital, where he was told that he probably had fractured ribs in the mid-chest area. Defendant was given medication for pain and told to take sitz baths for his knee.

Anthony Rocco, defendant's attorney, also testified at the suppression hearing. He testified that he first saw the defendant at 4 p.m. on May 4 and that he was limping. Rocco stated that the defendant said that he had been beaten and showed Rocco his right knee. According to Rocco, the knee was discolored. Rocco also stated that the defendant said that he had been mistreated by the Schiller Park police and by Detective Meese of the Des Plaines police.

Attorney Rocco did not testify regarding his various attempts to reach the defendant and talk to him prior to any questioning. However, during his closing argument on the motion to suppress, Rocco stated that he talked to Detective Meese by telephone around 1 p.m. on May 4 and specifically requested to talk to the defendant prior to any questioning. Rocco also argued that, sometime between 1 and 3 p.m., he made this same request of Assistant State's Attorney Raphaelson. Rocco concluded his argument by noting that he was not permitted to see the defendant until after he had given an incriminating statement and had been placed in a lineup.

At the close of testimony on defendant's motion to suppress, the court concluded "that [the] degree of physical confrontation contaminate[d] any statements defendant would have made at the Schiller Park Police Station, and accordingly any statements made relevant to this cause made by the defendant in the Schiller Park Police Station *** are hereby suppressed, and suppressed in toto." The court also found that the defendant was given his *Miranda* rights by Assistant State's Attorney Raphaelson and further found that "no physical cruelty was proved to be exerted by the police department in Des Plaines." The court concluded that defendant's "will was not overborne, and he acted without any compulsion or inducement of any sort whatsoever, and he received his rights, and he acted freely and voluntarily and intelligently when he made the statements of 2:05 and 2:30."

The case against the defendant proceeded to trial. During opening arguments, the State made no mention of defendant's incriminating statement in reviewing what it expected to prove and by what evidence. However, defense counsel Rocco did refer to defendant's inculpatory statement during his opening argument.

The State's principal witness was the complainant. She testified that she and her boyfriend left a party they were attending around midnight on May 4, 1980. A short while later, they discovered that their car had a flat tire. After pulling off onto the shoulder of Irving Park Road in Des Plaines, they found that the spare tire was flat as well. They turned on the car's emergency flashing lights, but no one stopped to give assistance. After about an hour, they decided to sleep in the car and go for help in the morning. They turned off the flashing lights, turned on the parking lights, and went to sleep.

The two awoke at dawn, approximately 6 a.m., on May 4 and began walking down Irving Park Road. Almost immediately, the defendant drove up in a blue Chevrolet Camaro and offered to give them a ride. They accepted and got into defendant's car. The complainant sat in the front passenger seat while her companion sat in the back seat. After driving around awhile, the defendant grabbed the complainant around her shoulder, placed a knife to her throat, and ordered her companion out of the car. When he refused to exit, the defendant said that he would kill the complainant unless he complied. He acquiesced and the defendant drove off with the complainant.

The complainant continued, testifying that the defendant held the knife under her arm while he drove. Defendant proceeded to the parking lot of an apartment complex where he ordered her to disrobe. After undressing, she testified that the defendant pushed her head into his groin area, where his penis entered her mouth. Defendant then stated, "you're not getting it hard," whereupon he cut her on the right leg from the upper thigh to the hip.

She stated that the defendant began driving again while his penis remained in her mouth. The defendant drove to an alley on Diversey in Chicago and parked. She said that a woman saw them drive into the alley. The defendant stopped the car and forced her to strad-

dle him and the defendant's penis entered her vagina. Defendant then ordered her out of the car and forced her to perform a second act of fellatio. Next, he told her to turn around and face the car, at which time she again felt his penis enter her vagina.

Defendant returned her clothes and told her to get dressed. He then told her to close her eyes and, when she asked why, he said, "it'll be easier that way. I'm going to knock you out." The complainant testified that she told him he could have anything he wanted, giving him her high school identification card while the defendant took her money, approximately $60. She concluded her testimony by stating that she began walking towards a grocery store and that she observed the defendant drive away in a vehicle that did not have a rear license plate.

The testimony of the victim's boyfriend corroborated the complainant's testimony about the events leading up to the abduction. He testified further that he was shown a picture of the defendant along with several other pictures and identified that of the defendant as representing the man who offered him and the complainant a ride on the morning of May 4, threatened him, and drove off with her. During his testimony, he also made an in-court identification of the defendant.

Medical testimony was presented confirming that the complainant had been cut on the right leg. There was also medical testimony confirming the presence of semen and spermatozoa in the vaginal swab taken from the complainant approximately an hour and a half after her release.

The State rested its case in chief. The defense elected not to present a case. Defense counsel, however, cross-examined all of the State's witnesses at length, establishing, among other things, that the semen and spermatozoa found in the vaginal swab could not be linked directly to the defendant nor could its age be determined; that no semen was found in the crotch of the bib overalls worn by the complainant; that no semen was found on defendant's underwear or on the jeans worn by the defendant; that the complainant's fingerprints were not found either in or on the defendant's automobile. During closing argument, defense counsel reviewed the State's case in detail. He concluded by saying, "Think of all the factors I've pointed out to you. I must have

pointed out to you 20, 30 reasonable doubts in my opinion. Consider those." Defense counsel also reminded the jury that the defendant had been subject to physical force by police.

The first issue on appeal is the validity of the defendant's waiver of his privilege against self-incrimination after receiving his *Miranda* rights while in custody at the Des Plaines police station.

The State contends that the appellate court erred in holding defendant's waiver invalid because it was given without knowledge that an attorney was attempting to confer with him. In support of its position, the State argues that this case is controlled by *Moran v. Burbine* (1986), 475 U.S. ___, 89 L. Ed. 2d 410, 106 S. Ct. 1135. In *Burbine*, a custodial suspect confessed after receiving and waiving his *Miranda* rights. He did so without knowledge that his sister had retained an attorney to represent him and that an associate of the attorney had been in telephone contact with the police specifically indicating that "she would act as Burbine's legal counsel in the event that the police intended to place him in a lineup or question him." While the associate was told that Burbine would not be questioned until the following day, police in fact interrogated him later that evening, securing three written statements which Burbine was unsuccessful in suppressing.

The Supreme Court concluded that a suspect's knowing and intelligent waiver of his *Miranda* rights does not require knowledge that an attorney has been retained or information that the attorney has been in contact with the police or has attempted to see the suspect. The Court held that "[o]nce it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the state's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law." (*Moran v. Burbine* (1986), 475 U.S. ___, ___, 89 L. Ed. 2d 410, 422, 106 S. Ct. 1135, 1142.) Since the *Burbine* standard was met in this case, the State urges that we apply it and hold that defendant's waiver was valid.

The defendant argues that the appellate court was correct in rejecting *Burbine* and following instead this court's decision in *People v. Smith* (1982), 93 Ill. 2d 179. Initially, defendant notes that the *Burbine* Court ex-

pressly invited the States to adopt more stringent standards for evaluating a suspect's waiver of his *Miranda* rights under applicable State constitutional provisions when it stated that "[n]othing we say today disables the States from adopting different requirements for the conduct of its employees and officials as a matter of state law." (*Moran v. Burbine* (1986), 475 U.S. ___, ___, 89 L. Ed. 2d 410, 425, 106 S. Ct. 1135, 1145.) The defendant urges that we accept this invitation and apply *Smith* to find that his privilege against self-incrimination guaranteed by article I, section 10, of the Illinois Constitution of 1970 (Ill. Const. 1970, art. I, sec. 10) was violated when the Des Plaines police and the assistant State's Attorney failed to inform him that an attorney had been contacted and was attempting to see him.

We decline defendant's invitation. In our view, *Smith* and *Burbine* are clearly distinguishable cases with *Burbine* being virtually on all fours with the instant case. Here, as in *Burbine*, a relative secured counsel for the suspect; the suspect was unaware that counsel had been retained; all communication between the police or prosecutors and the attorney was by telephone. *Smith* differs significantly from *Burbine* and the instant case. In *Smith*, the suspect actually met with an attorney after his arrest and personally retained him as counsel. Further, a partner of the retained counsel personally went to the jail where defendant was being held and asked to meet with him. She did not limit her communications to telephone conversations with the authorities or ask to be notified in the event authorities anticipated questioning her client or placing him in a lineup. Applying *Burbine*, we hold that the defendant was given his *Miranda* rights at the Des Plaines police station, that he understood the nature of those rights, and that his *Miranda* waiver was valid despite the fact that he was not told that an attorney wanted to confer with him prior to any interrogation or lineup.

The appellate court also held that defendant's *Miranda* waiver was invalid because it was secured by Detective Meese's "subterfuge." Meese told the defendant that he had received a report from the Chicago police department that his vehicle was seen in the same alley where the complainant was raped and that he would have to explain why his vehicle was there. However, no such report existed.

The State argues that this "subterfuge" does not invalidate the defendant's *Miranda* waiver. The State maintains that neither the Supreme Court nor this court has held that a lie, misrepresentation, or half-truth is sufficient to invalidate a *Miranda* waiver. *Frazier v. Cupp* (1969), 394 U.S. 731, 739, 22 L. Ed. 2d 684, 693, 89 S. Ct. 1420, 1425 (a false statement by police that his co-defendant had confessed "is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible"); *People v. Kashney* (1986), 111 Ill. 2d 454, 465-67 (a false statement by an assistant State's Attorney that defendant's fingerprints were found at the scene of an alleged rape is insufficient to invalidate a *Miranda* waiver); *People v. Martin* (1984), 102 Ill. 2d 412, 426-27 (same).

The defendant responds by arguing that, while a misrepresentation standing alone may not invalidate a *Miranda* waiver, a misrepresentation which is coercive in effect will invalidate the waiver. Defendant relies on *Lynumn v. Illinois* (1963), 372 U.S. 528, 530-35, 9 L. Ed. 2d 922, 924-27, 83 S. Ct. 917, 918-21, and *Spano v. New York* (1959), 360 U.S. 315, 319, 322-23, 3 L. Ed. 2d 1265, 1269, 1271-72, 79 S. Ct. 1202, 1205, 1206-07. In *Lynumn*, the Supreme Court invalidated a confession given after police told the defendant that, if she did not cooperate, her children would be taken away and she would lose her public aid. The Court held that these statements amounted to threats and that Lynumn's confession was coerced. In *Spano*, the defendant, upon his arrest, telephoned a close friend who, at the time, was enrolled in a police academy. On four separate occasions, the friend's police superiors ordered him to play on the defendant's sympathy by telling the defendant "that [his] telephone call had gotten him into trouble, that his job was in jeopardy, and that loss of his job would be disastrous to his three children, his wife, and his unborn child." In fact, the friend's job was in no way placed in jeopardy by the defendant's call. On the totality of the circumstances, the Court held that the defendant's will was overborne, which rendered his confession involuntary. However, use of the defendant's friend and the friend's false statement that his job was endangered was only one of a number of factors which rendered the confession involuntary. Spano was foreign born, emotionally unstable, with no criminal history, and was subject to

questioning for eight continuous hours.

Lynumn and *Spano* are clearly distinguishable from the case at bar and, in our view, do not control. Unlike *Lynumn*, Detective Meese's so-called "subterfuge" was not employed to suggest that the defendant would suffer physical, emotional, or material harm if he did not explain the presence of his automobile in the alley where the complainant was raped. Here, unlike Spano, there is no indication that the defendant lacked the capacity to understand his rights. He was questioned only briefly. Finally, Meese's statement did not threaten or imply that either the defendant or a loved one would be harmed in some way if the defendant asserted his right to remain silent rather than explain the presence of his automobile in the alley.

We also find unconvincing defendant's contentions that Meese's statement was false or misleading. It is true that Meese had not received a Chicago police report placing defendant's vehicle in the alley. However, the complainant testified that a woman saw the defendant drive into the alley where he then raped her, and the record indicates that Meese spoke to the complainant before interviewing the defendant. We hold, therefore, that defendant's waiver of his *Miranda* rights was unaffected by Meese's statement and is valid.

Defendant, however, advances a third argument in support of his contention that his *Miranda* waiver was invalid. He argues that his physical mistreatment by Schiller Park police should be imputed to the Des Plaines police and the assistant State's Attorney. Under his theory, physical coercion by one governmental entity renders involuntary any statements made to another governmental entity even though no physical force is used by the second entity. In support of this argument, defendant relies on *People v. Thomlison* (1948), 400 Ill. 555, 562-64, and *People v. Santucci* (1940), 374 Ill. 395, 398-401. In *Thomlison*, the defendant confessed to Alton, Illinois, police the day after being "brutally assaulted" by members of the same police force. In *Santucci*, the defendant confessed to Chicago police three days after being "severely beaten" by members of the Chicago police force in an unrelated incident. In both cases, this court held that the confessions were involuntary because the physical coercion of the first encounter carried over to and tainted the encounter which produced the confessions. Since the circuit court, in the instant case, suppressed defendant's statements made to the Schiller Park police because it found that there had been some type of "physical confrontation" while the defendant was in their custody, defendant concludes, on the authority of *Thomlison* and *Santucci*, that the "physical confrontation" tainted the interrogation by the Des Plaines police and the assistant State's Attorney which resulted in his oral incriminating statement. We do not agree.

Our review of the record indicates that there was no affirmative showing that the defendant was beaten by Schiller Park police. The defendant, testifying during the suppression hearing, claimed that he was beaten. However, two counts of the indictment against the defendant were for aggravated battery of two Schiller Park officers. At the conclusion of the suppression hearing, the court did not find that the defendant had been beaten but, rather, that there had been some sort of "physical confrontation." The court gave the defendant the benefit of any doubt and suppressed all statements made while in the custody of the Schiller Park police. However, in the absence of an affirmative finding of physical coercion by the Schiller Park police, there can be no coercion available to infect either the interrogation of Detective Meese of the Des Plaines police or the interrogation of Assistant State's Attorney Raphaelson.

The "physical confrontation" between the defendant and the Schiller Park police had no bearing on the events which transpired between the defendant and the Des Plaines police or the assistant State's Attorney. Accordingly, we conclude that the statement made by the defendant to the assistant State's Attorney while in the custody of the Des Plaines police was not coerced.

Defendant presses two other arguments in support of the appellate court's decision reversing his conviction. First, he contends that the State used its peremptory challenges to excuse two black prospective jurors solely on the basis of their race in violation of *Batson v. Kentucky* (1986), 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712.

We decline to address this issue because we find that the defendant, a Caucasian, does not have standing to assert a *Batson* violation. Under *Batson*, the defendant challenging the exclusion of prospective jurors because

of their race must show "that members of *his* race have been impermissibly excluded." (Emphasis added.) (476 U.S. 79, ___, 90 L. Ed. 2d 69, 85-86, 106 S. Ct. 1712, 1721.) Since defendant is white and the excluded prospective jurors are black, he is unable to show that members of his race have been excluded impermissibly. Thus, he is unable to establish the threshold element of a *prima facie Batson* violation.

Defendant argues, in the alternative, that the exclusion of the only two black prospective jurors in the jury array violated his sixth amendment right to trial by a jury representing a fair cross-section of the community. Neither this court (*People v. Gaines* (1984), 105 Ill. 2d 79, 88; *People v. Williams* (1983), 97 Ill. 2d 252, 278-80) nor the Supreme Court (*Batson v. Kentucky* (1986), 476 U.S. 79, ___ n.4, 90 L. Ed. 2d 69, 79 n.4, 106 S. Ct. 1712, 1716 n.4) have so held. We decline to overrule this court's prior holdings by finding that the peremptory exclusion of blacks or other minorities violates the fair cross-section requirement.

Defendant next argues that he received ineffective assistance of counsel at trial and urges this ground as an alternative basis for affirming the reversal of his conviction. According to the defendant, the State had decided not to use his inculpatory statement as part of its case in chief. However, the State reversed its position and placed the statement into evidence after defense counsel specifically mentioned the defendant's statement in opening argument before the jury. The defendant claims that this is an example of his counsel's ineffectiveness. The defendant also claims that cross-examination by counsel was often "irrelevant," "suggestive," "misleading," and "improper," forcing the trial court into frequent off-the-record admonitions. Defendant maintains that this conduct is indicative of incompetence.

To prevail on a claim that trial counsel was ineffective a defendant must show that counsel's performance fell "outside the wide range of professionally competent assistance" and "but for counsel's [incompetence], the result of the proceeding would have been different." *Strickland v. Washington* (1984), 466 U.S. 668, 690, 694, 80 L. Ed. 2d 674, 690, 698, 104 S. Ct. 2052, 2066, 2068; *People v. Collins* (1985), 106 Ill. 2d 237, 273-74; *People v. Albanese* (1984), 104 Ill. 2d 504, 525-27.

Our reading of the record leads to the conclusion that

the defendant has failed to sustain his burden on either prong of the *Strickland* test. As to the competence of defendant's trial counsel, we note that he succeeded in severing three counts of the indictment against the defendant. Trial counsel also succeeded in suppressing defendant's statements made to the Schiller Park police and was vigorous, if unsuccessful, in his efforts to suppress the incriminating statement given to the assistant State's Attorney at the Des Plaines station. Counsel's defense was effective enough to win a verdict of not guilty on the charge of aggravated battery of the victim.

Counsel was effective in creating a record which provided several grounds on which to challenge on appeal the validity of defendant's *Miranda* waiver. During selection of the jury, counsel challenged the State's use of its peremptory challenges to exclude black prospective jurors.

The record also reveals that counsel was vigorous in his cross-examination of witnesses with the apparent purpose of raising reasonable doubt in the minds of the jurors. For example, counsel brought out the fact that the complainant's fingerprints were not found either in or on the defendant's automobile. He also established that there was no semen found on defendant's underwear or other clothing and that the semen found on the complainant's clothing and in her vaginal swab could not be linked positively to the defendant. Finally, in closing argument, counsel stressed the inconsistencies he had developed during cross-examination, arguing that each one raised a reasonable doubt and that each one would support a verdict of not guilty on all counts.

The record establishes that counsel was active in his defense both in pretrial proceedings and during trial. On the totality of this record, the fact that he was first to raise defendant's inculpatory statement pales into insignificance. Further, even if we were to conclude that the reference to defendant's inculpatory statement was incompetent, it would remain incumbent upon the defendant to show that, but for that error, he would have been found not guilty. In view of the accurate and unwavering in-court and out-of-court identifications of the defendant by the complainant and her companion, we believe that there was ample evidence adduced to find the defendant guilty beyond a reasonable doubt. Therefore, even if it was error to raise the existence of defendant's incrimi-

nating statement, it cannot be deemed prejudicial on this record. We conclude that the defendant has not established that he received ineffective assistance of counsel.

Defendant also challenges his conviction for armed robbery affirmed by the appellate court. He contends that the State failed to prove that he took the complainant's school identification and money by force or threat of force, an essential element of the offense of armed robbery. After a thorough review of the record on this issue, we find ample support for defendant's armed robbery conviction.

The complainant testified that, after the final sexual assault, the defendant returned her clothing and told her to get dressed. After she did so, the defendant told her to close her eyes and, when she asked why, replied, "it'll be easier that way. I'm going to knock you out." To avoid further physical attack, she offered the defendant "anything he wanted." She then handed over her identification and the defendant took her money. Throughout this exchange, the defendant remained armed with the hunting knife he had displayed during the entire course of his sexual attacks on the complainant.

It is clear from the complainant's uncontradicted and unimpeached testimony that she parted with her property in order to avoid being a victim of yet another act of violence. Under these circumstances, the State proved beyond a reasonable doubt that the property of another was taken by force or threat of force. (*People v. Tiller* (1982), 94 Ill. 2d 303, 316.) We, therefore, affirm defendant's conviction for armed robbery.

Defendant's final two issues concern sentencing. He first contends that the circuit court erred in imposing an extended term sentence on the conviction of aggravated kidnaping because it is not an offense of "the class of the most serious offense of which the offender was convicted." (Ill. Rev. Stat. 1979, ch. 38, par. 1005—8—2(a).) He contends that aggravated kidnaping is a Class 1 felony while rape and deviate sexual assault are Class X felonies. He concludes that, under the extended term sentencing provision, only the convictions for rape and deviate sexual assault can provide the basis for extended term sentences.

The State concedes that the extended term sentence for aggravated kidnaping was improper. Therefore, on the authority of *People v. Jordan* (1984), 103 Ill. 2d 192,

204-07, and *People v. Evans* (1981), 87 Ill. 2d 77, 87, we vacate defendant's sentence for aggravated kidnaping.

Defendant's final challenge is directed at the imposition of a consecutive sentence on the armed robbery conviction as well as the court's order that all sentences for the instant convictions were to be served consecutively to "any parole violations." We first consider the propriety of a consecutive sentence for the armed robbery conviction.

Section 5—8—4 of the Unified Code of Corrections (Ill. Rev. Stat. 1979, ch. 38, pars. 1005—8—4(a), (b)) provides that a consecutive sentence may be imposed where the court finds: (1) that the offense receiving the consecutive sentence was substantially different from the other offenses for which the defendant was sentenced, and (2) that imposition of a consecutive sentence is necessary to "protect the public from further criminal conduct by the defendant."

The record reveals that the circuit court expressly found that the defendant's objective changed during the course of the kidnaping. The court also found that the initial motivation for the kidnaping was sexual gratification and further found that the sexual assault was completed at the time the defendant robbed the victim. The court then referred to the defendant's prior convictions for four armed robberies and concluded that society required protection from the defendant's future criminality. The court then ordered that the sentence for armed robbery be served consecutively to the concurrent sentences imposed for rape, deviate sexual assault, and aggravated kidnaping.

A consecutive sentence imposed pursuant to applicable law and supported by the record will not be disturbed on review. (*People v. Steppan* (1985), 105 Ill. 2d 310, 323.) We believe that the court had ample grounds to impose a consecutive sentence for the armed robbery conviction.

It is manifest beyond peradventure that, at the time of the armed robbery, the sexual assault of the complainant had terminated and that the defendant was preparing to release her. The complainant testified that the defendant had returned her clothes and that she was dressed when the defendant threatened to "knock her out," subsequently taking her identification and money. After taking possession of this property, the defendant

allowed her to leave and, while leaving, she saw him drive away.

It is also clear that society requires protection from the defendant. He committed a traumatic series of sexual assaults over the course of two hours upon a teenage girl, threatened to kill her throughout the ordeal, and threatened to kill her if she reported the incident to the police. These events occurred while the defendant was on parole on four convictions for armed robbery, the same offense committed here. Thus, there is more than adequate support for the court's order that the sentence for armed robbery be served consecutively, and we affirm this order.

Defendant's second sentencing challenge is to the court's order that all sentences imposed in the instant case were to be served consecutively to "any parole violations." He contends that a sentence consecutive to "any parole violations" is insufficiently specific and that remand for resentencing is required.

The State argues that the court meant to order that the sentences in the instant case were to be served consecutively to defendant's reconfinement for violation of parole on his prior armed robbery convictions. According to the State, the record shows the case numbers of the prior convictions in addition to a presentence report containing a notation of these convictions along with a narrative indication that a warrant for parole violation had issued, with the Prison Review Board preparing to take action at a later date.

This court has affirmed imposition of sentences consecutive to an unrelated prior sentence where the completion of the prior sentence and the beginning of the later sentence can be ascertained from the record. (*People v. Toomer* (1958), 14 Ill. 2d 385, 387.) We agree with the State that the necessary certainty can be derived from this record and, therefore, affirm the order that the sentences in the instant case are to be served consecutively to any remaining portion of the defendant's sentence for the four prior armed robbery convictions.

For the reasons stated herein, we reverse the judgment of the appellate court. We affirm defendant's convictions and all sentences with the exception of the extended term sentence for aggravated kidnaping, which is vacated. The cause is remanded to the circuit court of Cook County for resentencing on the aggravated kidnaping conviction.

Appellate court reversed;
convictions affirmed;
cause remanded.

JUSTICE CUNNINGHAM took no part in the consideration or decision of this case.

CHIEF JUSTICE CLARK, specially concurring:

I specially concur.

I concur in the result only because I agree with the State that the defendant's attorney did not in fact request access to his client. If the attorney had actually requested access to his client, the failure to so inform the client of this fact would, in my opinion, render invalid the client's subsequent waiver of his State constitutional privilege against self-incrimination. I deal with each of these points in turn.

I

The State argues, to my mind convincingly, that the defendant's attorney, Anthony Rocco, did not request access to his client. Rocco testified at the suppression hearing. He failed to mention any attempt to speak with his client. While the opinion states that the defendant's wife testified that Rocco had "related [to her] his unsuccessful efforts to see the defendant" (slip op. at 5), it does not state what these efforts were. Officer Meese testified only that Rocco called him and asked to be notified before the defendant was placed in a lineup. He further testified that he did in fact call Rocco and attempt to notify him of the lineup, leaving a message on Rocco's answering machine.

On cross-examination, Rocco asked Meese whether he, Rocco, had also told Meese that he wanted to see and speak with the defendant before interrogation. Meese denied this. Only during his closing argument on the motion to suppress did Rocco directly assert that he had asked to see the defendant.

It is elementary that the factual determinations of the trial court on a motion to suppress are not to be overturned unless manifestly erroneous. (*People v. Clark* (1982), 92 Ill. 2d 96, 99.) The trial court here was entitled to conclude that Meese's testimony as to what Rocco had said was more credible than the defendant's wife's hearsay account of what Rocco told her he had

said to Meese. As for Rocco's statements during closing argument, these were not evidence. (See *People v. Carlson* (1982), 92 Ill. 2d 440, 449.) The appellate court's contrary conclusion was based upon a misreading of the record; it is simply not true that the "defendant's attorney *** *testified* at the pretrial hearing on the defendant's motion to suppress the defendant's statements that he asked to talk to the defendant when he spoke with Officer Meese on the telephone." (Emphasis added.) (147 Ill. App. 3d 323, 336.) He did not testify; at best, he alleged.

I would therefore reverse the appellate court on the ground that the claimed effort to prevent the attorney from conferring with his client simply did not take place. I also agree with the majority that the defendant's other claims of error are erroneous. There was no affirmative finding of a physical confrontation by the Schiller Park officers, and Meese's statement about the police report had some basis in fact. Further, I agree that the defendant, who is white, has no standing to assert a *Batson* violation based on the exclusion of black jurors. (*Batson v. Kentucky* (1986), 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712.) However, since the majority has chosen to address the attorney access issue, I take this opportunity to express my own view on its merits.

II

From time immemorial the practice of holding suspects *incommunicado* has been rightfully abhorred. Courts have viewed with suspicion efforts to prevent lawyers from meeting with their arrested clients, even where the client has not formally invoked his right to meet with the lawyer. In fact, continued interrogation of a client who has not been informed of his attorney's contemporaneous efforts to meet with him has been nearly universally condemned.

The endorsement of such interrogation inevitably degrades and deforms our adversary system of criminal justice. It encourages law enforcement officials to treat the defendant's attorney as a supernumerary figure, an inconsequential busybody whose efforts on behalf of his client can be—and undoubtedly will be—rejected with contempt. It simultaneously weakens the client's ability to make a knowing and intelligent waiver of his rights by depriving him of a critical piece of information.

Such interrogation conflicts with an adversarial system of justice. It offends against traditional notions of justice and fair play.

I am therefore sorry to see the majority endorse this practice.

As I understand the majority's opinion, it holds either: (1) that the constitutional guarantee against self-incrimination contained in our State Constitution does not prohibit the police from denying an attorney access to his client, or (2) that our State Constitution prohibits only the denial of access to an attorney who is actually present at the site of interrogation, but not to an attorney who merely telephones the station house. Whichever is the court's actual holding, I do not agree.

To understand the nature of my disagreement it is necessary to review some of the prior case law. A review of that history demonstrates that we are not compelled by *Moran v. Burbine* (1986), 475 U.S. ___, 89 L. Ed. 2d 410, 106 S. Ct. 1135, to adopt an overly restrictive view of our own constitutional privilege against self-incrimination.

In *Escobedo v. Illinois* (1964), 378 U.S. 478, 12 L. Ed. 2d 977, 84 S. Ct. 1758, the United States Supreme Court held that a police refusal to honor the defendant's request to consult with his lawyer during a custodial interrogation violated the defendant's sixth amendment right to the assistance of counsel. In *Escobedo* the defendant was arrested and taken to police headquarters. A lawyer retained to represent the defendant by the defendant's mother arrived shortly thereafter. When the lawyer attempted to see his client he was rebuffed both by the desk sergeant and by the homicide detectives who were interrogating the defendant. Several times the defendant asked the interrogating detectives whether he could see his lawyer, but each time the detectives told him that his lawyer did not want to see him. The defendant's eventual confession was admitted, and his motion to suppress was denied.

In *Escobedo*, the Supreme Court, basing its decision solely on the sixth amendment right to counsel, held that the defendant's confession should be suppressed where the suspect requests and has been denied an opportunity to consult with his lawyer, and where the police have not effectively warned him of his absolute constitutional right to remain silent. (378 U.S. 478, 491, 12 L. Ed. 2d 977, 986, 84 S. Ct. 1758, 1765.) However, the fact that

the police had also denied the *lawyer's* requests to see his client did not pass unnoticed. The Court clearly stated that "it 'would be highly incongruous if our system of justice permitted the district attorney, the lawyer representing the State, to extract a confession from the accused while his own lawyer, seeking to speak with him, was kept from him by the police.' " 378 U.S. 478, 487, 12 L. Ed. 2d 977, 984, 84 S. Ct. 1758, 1763, quoting *People v. Donovan* (1963), 13 N.Y.2d 148, 152, 193 N.E.2d 628, 629.

While *Escobedo* was partially superseded by the Supreme Court's decision in *Miranda v. Arizona* (1966), 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, the Court clearly indicated that *Escobedo* retained independent significance. After summarizing the facts of *Escobedo*, the Court stated: "The police also prevented the attorney from consulting with his client. Independent of any other constitutional proscription, this action constitutes a violation of the Sixth Amendment right to the assistance of counsel and excludes any statement obtained in its wake." (384 U.S. 436, 465 n.35, 16 L. Ed. 2d 694, 718 n.35, 86 S. Ct. 1602, 1623 n.35.) Even in decisions later than *Miranda*, the Supreme Court continued to view *Escobedo* as a distinct holding, although it now viewed it as rooted in the fifth amendment privilege against self-incrimination rather than the sixth amendment right to counsel. See, *e.g.*, *Kirby v. Illinois* (1972), 406 U.S. 682, 689, 32 L. Ed. 2d 411, 417, 92 S. Ct. 1877, 1882.

Given this background it is far from surprising that the vast majority of State courts examining this issue prior to *Burbine* held that a suspect's waiver of *Miranda* rights would not be valid if the police neglected or refused to inform the suspect that his attorney was attempting to assist him. See, *e.g.*, *Weber v. State* (Del. 1983), 457 A. 2d 674; *Haliburton v. Florida* (Fla. 1985), 476 So. 2d 192; *State v. Matthews* (La. 1982), 408 So. 2d 1274; *Lodowski v. Maryland* (1985), 302 Md. 691, 490 A.2d 1228; *Commonwealth v. McKenna* (1969), 355 Mass. 313, 244 N.E.2d 560; *Lewis v. State* (Okla. App. 1984), 695 P.2d 528; *State v. Haynes* (1979), 288 Or. 59, 602 P.2d 272; *Commonwealth v. Hilliard* (1977), 471 Pa. 318, 370 A.2d 322 (plurality opinion); *Dunn v. State* (Tex. Crim. App. 1985), 696 S.W.2d 561; *State v. Jones* (1978), 19 Wash. App. 850, 578 P.2d 71.

The Illinois Supreme Court likewise held that "when police, prior to or during custodial interrogation, refuse an attorney appointed or retained to assist a suspect access to the suspect, there can be no knowing waiver of the right to counsel if the suspect has not been informed that the attorney was present and seeking to consult with him." (*People v. Smith* (1982), 93 Ill. 2d 179, 189.) While the United States Supreme Court has now held that the Federal Constitution does *not* require the police to inform a suspect of an attorney's efforts to reach him, the Court carefully stated that "[n]othing we say today disables the States from adopting different requirements for the conduct of its employees and officials as a matter of state law." *Moran v. Burbine* (1986), 475 U.S. ___, ___, 89 L. Ed. 2d 410, 425, 106 S. Ct. 1135, 1145.

The majority declines to accept this invitation to read our State constitutional privilege (Ill. Const. 1970, art. I, sec. 10) more broadly than the Federal privilege. This, of course, it is entitled to do. But I am troubled that the majority has not only declined to accept the invitation but has declined it in such peremptory fashion. Surely a question involving the interpretation of our own constitution by its ultimate arbiter deserves longer shrift.

I have already written at length on the basis for our right to give our State constitutional guarantees a more liberal interpretation than the corresponding guarantees in the Federal Constitution (*People v. Tisler* (1984), 103 Ill. 2d 226 (Clark, J., specially concurring)), and I see no need to repeat those arguments. But I do note that they have particular application to this case. It is one thing for us to seek guidance from the Supreme Court's constitutional decisions when those decisions are predictable and consistent. It is another to follow blindly where the Court itself has retreated from positions previously taken.

As the foregoing demonstrates, *Moran v. Burbine* is not simply an application of long established principles. Instead, it is a significant shift in the direction of the Supreme Court's thinking, and a direct repudiation of its statements in *Escobedo* and *Miranda*. It was no accident that nearly every State, not excluding Illinois, read those statements to mean that the undisclosed denial of attorney access would render a *Miranda* waiver invalid. Indeed, *Burbine* arguably overrules *Escobedo*, since it deprives the case of any significance other than that of

precursor to *Miranda*. More profoundly, *Burbine* transforms *Miranda* from the defendant's shield into the prosecutor's sword. The presence of *Miranda* warnings will now apparently excuse police conduct which many State courts (see, *e.g.*, *People v. Donovan* (1963), 13 N.Y.2d 148, 193 N.E.2d 628) found unacceptable even before *Miranda* was decided.

Given this history, it is incumbent upon us to undertake our own examination of whether denial of attorney access violates our State constitutional privilege against self-incrimination. For several reasons, I believe that it does.

First, while *People v. Smith* (1982), 93 Ill. 2d 179, did not mention the State Constitution as an alternate ground for its decision, it cited and discussed two cases which *did* rely on their own constitutions, *State v. Haynes* (1979), 288 Or. 59, 602 P.2d 272, and *State v. Matthews* (La. 1982), 408 So. 2d 1274. (See also *Lewis v. State* (Okla. 1984), 695 P.2d 528; *Dunn v. State* (Tex. Crim. App. 1985), 696 S.W.2d 561.) Indeed, this use of State constitutions was prominently mentioned in *Smith* itself. 93 Ill. 2d 179, 188.

Second, since *Burbine* was decided, at least one State court has declined to follow it, holding that its own privilege against self-incrimination affords defendants greater protection. *People v. Houston* (1986), 42 Cal. 3d 595, 724 P.2d 1166, 230 Cal. Rptr. 141.

Third, article I, section 10, of the Illinois Constitution of 1970 was adopted during a high-water mark of political liberalism, prior to *Burbine*. To say that *Burbine* must determine our interpretation of our own constitution is, therefore, to credit those who ratified it with clairvoyance. Moreover, our constitution was adopted after *Escobedo* and *Miranda*, at a time when the United States Supreme Court itself had indicated that preventing an attorney from seeking his client violated the Federal Constitution, and when all State courts held the same. Interestingly, the committee presentation on section 10 was given to the 1970 constitutional convention by Bernard Weisberg, who had argued *Escobedo* for the defendant. (3 Record of Proceedings, Sixth Illinois Constitutional Convention 1376-77.) He, and the other members of the committee, could not have been unaware of the decision in that case.

Finally, and most importantly, there are strong policy

reasons for holding that a defendant should be informed of his attorney's attempts to see him. In general, the State bears the burden of proving that a waiver of constitutional rights is valid. (See, *e.g.*, *Brewer v. Williams* (1977), 430 U.S. 387, 51 L. Ed. 2d 424, 97 S. Ct. 1232.) An attorney's communication to the police about his client is an event which has a direct bearing upon whether a waiver is knowing or intelligent. For, "[t]o pass up an abstract offer to call some unknown lawyer is very different from refusing to talk with an identified attorney actually available to provide at least initial assistance and advice, whatever might be arranged in the long run. A suspect indifferent to the first offer may well react quite differently to the second." (*State v. Haynes* (1979), 288 Or. 59, 72, 602 P. 2d 272, 278.) It is significant that the American Bar Association filed an *amicus* brief on the defendant's behalf in *Burbine*, and that the ABA standards for criminal justice mandate that a lawyer be allowed to see his client. (ABA Standards for Criminal Justice secs. 5—5.1, 5—7.1 (2d ed. 1980).) Beyond this, acceptance of *Burbine* would seem to lead to the proposition that the police have an absolute right to hold suspects *incommunicado*.

I also cannot accept the majority's attempt to distinguish between personal visits and telephone calls. While it is true that *Smith* involved an attorney who appeared at the station house, the court in *Smith* favorably cited two cases, *State v. Matthews* (La. 1982), 408 So. 2d 1274, and *State v. Jones* (1978), 19 Wash. App. 850, 578 P.2d 71, which did involve telephone calls. Nor should the manner of attempted communication make any difference. In an age of modern transportation and communication, an attorney who telephones is very nearly as "available" to speak with the defendant as an attorney who has actually arrived at the station house. In any case, I note that the majority's attempt to distinguish *Smith* preserves for later consideration the issue of whether our State Constitution grants a broader privilege against self-incrimination in cases where the attorney is actually present.

JUSTICE SIMON, dissenting:

"Confessions of the accused are among the most powerful weapons employed in the prosecution of crimes. Nothing else can equal the impact upon the fact finder of

an apparent admission of guilt by the party charged." (2 J. Cook, Constitutional Rights of the Accused 21 (2d ed. 1986); *People v. Prohaska* (1956), 8 Ill. 2d 579, 585 (confession of guilt is evidence of a "high and convincing character").) Therefore, courts must endeavor to ensure that confessions that reach the jury are reliable and voluntary products of police investigation and interrogation. The procedures used by the police in this case to obtain defendant's confession—physical force, misrepresentation, and separation of counsel and client—undermine the reliability of the resulting confession and are impermissible under both State and Federal law. The trial court's failure to suppress the resulting nonvoluntary confession constitutes error entitling defendant to a new trial. In addition, because all prospective black jurors were kept from service on the jury through the State's use of peremptory challenges, defendant is entitled at the very least to a hearing on whether those jurors were unconstitutionally excluded from the jury which convicted him in violation of *Batson v. Kentucky* (1986), 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712. See also *Griffith v. Kentucky* (1987), 479 U.S.___, 93 L. Ed. 2d 649, 107 S. Ct. 708 (*Batson* applies retroactively to cases where the conviction had not become final before the new rule was announced).

A review of the circumstances surrounding defendant's confession to the Des Plaines police reveals three factors which combined to induce defendant's involuntary confession: physical injuries suffered by defendant while in the custody of the Schiller Park police, misrepresentations made to defendant by the Des Plaines police in order to induce defendant to confess, and the separation of defendant and his attorney during the period of police interrogation. I will address each of these factors separately.

At the suppression hearing, defendant testified that he was beaten by Schiller Park police. He described two episodes of brutality in which he was kicked, hit, and knocked to the ground, punched and beaten with a nightstick, raised off the floor by elevating his handcuffed arms behind him, and his hair was pulled. Defendant testified that as a result he suffered pain in his ribs and in his right knee, and that he lost tufts of hair. Defendant's claims of mistreatment were corroborated by his attorney's testimony that at their first meeting defendant

told him that he had been beaten and showed the attorney his visibly injured knee. Defendant received no medical treatment for his injuries while at the Schiller Park or Des Plaines police stations on the day of his interrogation and confession. After a medical examination at Cermak Hospital the following day, defendant was informed that he probably had fractured ribs in the midchest area, advised to treat his injured knee with sitz baths, and given pain medication. After hearing all the evidence at the suppression hearing, the trial judge determined that the "apparently very severe physical confrontation" between defendant and the police warranted suppression of inculpatory statements made by defendant at the Schiller Park police station. The trial judge declined to suppress statements made at the Des Plaines station, however, in part because no additional physical cruelty was proven to have been exerted against defendant in Des Plaines.

It is axiomatic that confessions obtained through physical brutality or force may not be used as evidence to secure a conviction against the accused. (*Brown v. Mississippi* (1936), 297 U.S. 278, 285-86, 80 L. Ed. 682, 687, 56 S. Ct. 461, 464-65; *People v. O'Leary* (1970), 45 Ill. 2d 122, 125; *People v. Davis* (1966), 35 Ill. 2d 202, 205; *People v. Cunningham* (1964), 30 Ill. 2d 433, 436; *People v. Prohaska* (1956), 8 Ill. 2d 579, 585; *People v. Davis* (1948), 399 Ill. 265, 271.) In addition, brutality may render inadmissible not only inculpatory statements made by the accused during the beating or mistreatment, but also statements made later which are deemed to be tainted by the earlier brutality. *People v. Thomlison* (1948), 400 Ill. 555; *People v. Santucci* (1940), 374 Ill. 395.

Here, the defendant confessed within approximately six hours of sustaining significant injuries while in the custody of the Schiller Park police. When asked "Did you confess because *** you were hurt?" the defendant replied, "Yes, I wanted people to just leave me alone." That defendant suffered no additional physical brutality at the Des Plaines station (a fact which defendant disputes) does not vitiate the physical coercion to which defendant had already been subjected, especially because at the time of his confession defendant had received no medical treatment for his injuries. In view of these circumstances, the numerous *Miranda* warnings defendant

received before confessing, and his experience in dealing with the police, could not cure the coercive effect of the actions of the Schiller Park police. Therefore, defendant's Des Plaines confession was tainted by the physical confrontation in Schiller Park, and the trial court erred in concluding that the confession was admissible.

The majority's suggestion that "there can be no coercion available to infect [defendant's statements]" in the "absence of an affirmative finding of physical coercion" (slip op. at 14) is not accurate. Here, it is uncontroverted that defendant sustained numerous injuries while in the hands of Schiller Park police. The trial court's finding that a "very severe physical confrontation" had taken place necessarily includes a finding of coercion; otherwise, the trial court would not have suppressed defendant's statements. In this light, the majority's insistence on an "affirmative finding" of brutality is little more than a semantic game.

The second factor which rendered defendant's confession inadmissible is the subterfuge used by the Des Plaines police to coerce defendant into confessing. Officer Meese of the Des Plaines police admitted at trial that he made untrue statements to defendant during the interrogation which led to defendant's confession. Specifically, Meese told defendant that the Des Plaines police had received a report identifying his car at the scene of the crime:

> "At that time I indicated to him that we were notified by the City of Chicago that his vehicle was observed in the alley involved in a rape incident, and that he could not be identified, but that he would have to explain why the vehicle was there."

Meese's misrepresentation achieved its desired result. Although defendant had already given a statement denying involvement in the crime, defendant gave another statement following Meese's subterfuge in which he confessed.

In *Miranda v. Arizona* (1966), 384 U.S. 436, 476, 16 L. Ed. 2d 694, 725, 86 S. Ct. 1602, 1629, the United States Supreme Court stated that:

> "[A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver [of the fifth amendment privilege against self-incrimination] will, of course, show that the defendant did not voluntarily waive his privilege."

(See also *Moran v. Burbine* (1986), 475 U.S. 412, 421, 89

L. Ed. 2d 410, 421, 106 S. Ct. 1135, 1141 (relinquishment of *Miranda* rights "must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception"); see, *e.g.*, *People v. Hogan* (1982), 31 Cal. 3d 815, 647 P.2d 93, 183 Cal. Rptr. 817 (confession inadmissible due to misrepresentation); *State v. Howard* (Tenn. Crim. App. 1981), 617 S.W.2d 656 (same); *Commonwealth v. Meehan* (1979), 377 Mass. 552, 387 N.E.2d 527 (same).) In assessing whether misrepresentation renders a defendant's confession involuntary and therefore inadmissible this court has applied a totality-of-circumstances test. Under this test misrepresentation is only a factor to be considered, along with "age, education and intelligence of the accused, the duration of questioning, and whether he received his constitutional rights or was subjected to any physical punishment." *People v. Kaskney* (1986), 111 Ill. 2d 454, 466-67, quoting *People v. Martin* (1984), 102 Ill. 2d 412, 427.

Applying this test to the facts in this case compels the conclusion that defendant's confession was inadmissible. Not only had the defendant been subjected to severe physical brutality, but also he was kept incommunicado from his attorney in violation of his constitutional rights. In addition, defendant had been in police custody since early that morning and had been questioned by two different police departments and at least two assistant State's Attorneys. The fact that defendant had received repeated *Miranda* warnings is of little significance in the face of these coercive conditions and the extended interrogation to which the defendant was subjected.

Based on its reading of *Spano v. New York* (1959), 360 U.S. 315, 3 L. Ed. 2d 1265, 79 S. Ct. 1202, and *Lynumn v. Illinois* (1963), 372 U.S. 528, 9 L. Ed. 2d 922, 83 S. Ct. 917, the majority concludes that the subterfuge employed by Officer Meese did not coerce the defendant's confession because it was "not employed to suggest that the defendant would suffer physical, emotional, or material harm" or that "the defendant or a loved one would be harmed in some way" if the defendant refused to confess. (Slip op. at 13.) This is an overly narrow reading of *Lynumn* and *Spano*; these cases did not establish a requirement that the defendant or his loved ones be directly threatened with harm before a misrepresentation can be deemed to have a coercive ef-

fect powerful enough to invalidate defendant's confession. Instead, the central inquiry under *Spano* and *Lynumn* is whether, considering the totality of circumstances, the defendant's will was overborne by the techniques employed by the police in obtaining the confession. (*Spano*, 360 U.S. at 323, 3 L. Ed. 2d at 1271-72, 79 S. Ct. at 1207; *Lynumn*, 372 U.S. at 534, 9 L. Ed. 2d at 926, 83 S. Ct. at 920.) Under this approach, defendant need not establish threats of the same directness or magnitude as those in *Spano* or *Lynumn* in order to establish that his will was overborne. Here, the effect of the officer's subterfuge, which falsely implied that the police had eyewitness evidence against defendant, must be judged in light of the facts that defendant was suffering physical injuries and had already been interrogated and given an exculpatory statement. Under these circumstances, defendant's confession cannot be characterized as " 'the product of a rational intellect and a free will.' " *Lynumn*, 372 U.S. at 534, 9 L. Ed. 2d at 926, 83 S. Ct. at 920, quoting *Blackburn v. Alabama* (1963), 361 U.S. 199, 208, 4 L. Ed. 2d 242, 249, 80 S. Ct. 274, 280; *People v. Kincaid* (1981), 87 Ill. 2d 107, 117.

Even before the United States Supreme Court announced its decision in *Miranda v. Arizona* prohibiting trickery in obtaining confessions, this court had denounced the use of trickery and falsehood to coerce a defendant's confession. (See *People v. Stevens* (1957), 11 Ill. 2d 21, 27.) We should continue to denounce and deter these practices by rendering the fruit of such tactics inadmissible, especially where, as here, defendant's confession was elicited through knowing and deliberate misrepresentation by the police with the specific intent to induce defendant's confession. See *Spano*, 360 U.S. at 324, 3 L. Ed. 2d at 1272, 79 S. Ct. at 1207 (where an "undeviating intent of the officers to extract a confession *** is shown *** the confession obtained must be examined with the most careful scrutiny"); see also *People v. Kashney* (1986), 111 Ill. 2d 454, 467 (Goldenhersh, J., concurring in part and dissenting in part) (contending that use of deceptive practices by the police in obtaining confessions violates *Miranda*); *People v. Martin* (1984), 102 Ill. 2d 412, 429 (Goldenhersh, J., dissenting) (same).

The third factor which indicates that defendant's confession was improperly obtained and should be suppressed is the way in which the defendant was kept in-

communicado from his attorney. I agree with Chief Justice Clark's analysis of this issue in the specially concurring opinion, and thus will not repeat those arguments here. I disagree with the special concurrence, however, on two points. First, there was sufficient evidence to establish that defendant's attorney requested access to defendant during the interrogation period. Defendant's wife testified at the suppression hearing that the attorney had attempted to contact the defendant. Also, although the attorney's closing statement in the suppression hearing (in which he detailed his attempts to contact defendant) was not sworn testimony, as an officer of the court the attorney was under a continuing ethical duty to speak truthfully, and we have no reason to doubt his veracity. Furthermore, the trial court recognized that he was introducing facts in his closing not presented in testimony, but allowed him to continue over the State's objection. Under these circumstances the attorney had every reason to believe his statement was being accepted by the court as the functional equivalent of testimony, and I would regard the statement as such. His attempts to contact his client were also enumerated in the written motion to suppress defendant's confession filed before the suppression hearing. Moreover, as the appellate court noted, the testimony of the officer who claimed that the attorney had not requested access to the defendant had been severely discredited.

Second, because of a critical factual difference between this case and *Moran v. Burbine* (1986), 475 U.S. 412, 89 L. Ed. 2d 410, 106 S. Ct. 1135, I am not convinced that *Burbine* controls the result here under Federal law. In *Burbine*, the defendant never expressed any desire for an attorney. The Court repeatedly noted the significance of this factor in its decision: "At no point during the course of the investigation *** did [defendant] request an attorney *** he '[did] not want an attorney called or appointed' *** he had access to a telephone, which he apparently declined to use *** he at no point requested the presence of a lawyer." (475 U.S. at 415, 417-18, 420, 89 L. Ed. 2d at 417, 418, 420, 106 S. Ct. at 1138, 1139, 1141.) The Court also reiterated the *Miranda* requirement that "[i]f the individual indicates *in any manner, at any time prior to or* during questioning, that he wishes to remain silent, [or if he] states that he wants an attorney, the interrogation must cease."

(Emphasis added.) (475 U.S. at 420, 89 L. Ed. 2d at 420, 106 S. Ct. at 1141, quoting *Miranda v. Arizona* (1966), 384 U.S. 436, 473-74, 16 L. Ed. 2d 694, 723, 86 S. Ct. 1602, 1627.

In the present case it is undisputed that a Schiller Park police officer called defendant's wife from the station and discussed defendant's arrest and bail with her. The officer then put defendant on the line, at which time defendant instructed his wife to retain a specific attorney in his behalf. Thus, in this case, unlike *Burbine*, it is uncontested that defendant had actively sought the advice and counsel of an attorney prior to interrogation and confession. Defendant in this case, unlike the defendant in *Burbine*, had every expectation that an attorney would be contacting him. Defendant was persuaded to confess only after the police had successfully kept the defendant and his attorney separated prior to and during the interrogation period. Perhaps defendant lost hope that the attorney would actually appear for his defense, or without the benefit of counsel simply gave in to the pressure to confess exerted by his interrogators.

Also, the Court in *Burbine* noted as significant that there was no evidence of physical coercion, and that the defendant initiated the confession conversation. In contrast, defendant in the present case had been physically injured at the hands of police only a few hours earlier, and had already been subjected to repeated interrogation initiated by the police before he confessed. I would hold, therefore, that because of the critical factual differences between *Burbine* and the present case, *Burbine* does not control the result in this case. We should look to the United States Supreme Court's earlier statements in *Miranda* and *Escabedo*, as discussed in the special concurrence, for the resolution of the separation of attorney and client issue. See, *e.g.*, *Miranda*, 384 U.S. at 476, 16 L. Ed. 2d at 724-25, 86 S. Ct. at 1629 ("Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights").

In sum, it is clear that the combined conduct of the Schiller Park and Des Plaines police in this case rendered defendant's confession involuntary and that the confession therefore should be suppressed. In the words

of Chief Justice Earl Warren:

> "The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." *Spano v. New York* (1959), 360 U.S. 315, 320-21, 3 L. Ed. 2d 1265, 1270, 79 S. Ct. 1202, 1205-06.

Even if defendant's confession could be deemed voluntary and admissible, defendant's conviction is still drawn into question by the State's use of peremptory challenges to exclude black persons from the jury. Two black potential jurors, the only black persons on a venire of 40 people, were eliminated by the State through the exercise of its peremptory challenges, resulting in an all-white jury. Defendant contends that the exclusion of black persons from the jury violated his fourteenth amendment right to equal protection of the laws and his right to a jury selected from a representative cross-section of the community under the sixth amendment. The majority concludes that defendant does not have standing to assert a *Batson* violation on equal protection grounds because he is white and the excluded prospective jurors are black, and dismisses defendant's sixth amendment argument as precluded by this court's earlier rulings.

Even if *Batson* forecloses challenges to the discriminatory use of peremptory challenges under an equal protection analysis when the defendant is not a member of the class excluded from the jury, it in no way endorses the continued discriminatory exclusion of black people from juries. The *Batson* Court noted that the use of peremptory challenges to exclude black persons was impermissible based on three factors: harm to the defendant, harm to the juror, and harm to the community. Minorities, according to the Court, have an interest independent from the defendant's in serving as jurors:

> "Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. *** A person's race simply 'is unrelated to his fitness as a juror.' [Citation.] As long ago as *Strauder*, therefore, the Court recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the ex-

cluded juror." (*Batson*, 476 U.S. at ___, 90 L. Ed. 2d at 81, 106 S. Ct. at 1717-18.)

The community also has an interest in preventing discriminatory exclusion from jury service:

> "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. *Batson*, 476 U.S. at ___, 90 L. Ed. 2d at 81, 106 S. Ct. at 1718.

The Supreme Court used sweeping language throughout *Batson* in renouncing as unconstitutional exclusion of black persons from the jury, evincing a commitment to prohibit discriminatory exclusion tactics in their entirety: "the Constitution prohibits *all forms* of purposeful racial discrimination in the selection of jurors." (Emphasis added.) (476 U.S. at ___, 90 L. Ed. 2d at 82, 106 S. Ct. at 1718.) The Court noted that in many State and Federal courts "the [peremptory] challenge may be, and unfortunately at times has been, used to discriminate against black jurors," and concluded that "[i]n view of the heterogeneous population of our nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race." 476 U.S. at ___, 90 L. Ed. at 89, 106 S. Ct. at 1724.

Furthermore, the *Batson* Court made clear that the prohibition against discriminatory tactics now applies not only to the selection of the jury panel or venire, but equally to the selection of the petit jury. "While decisions of this Court have been concerned largely with discrimination during selection of the venire, *the principles announced there also forbid discrimination on account of race in the selection of a petit jury.*" (Emphasis added.) (476 U.S. at ___, 90 L. Ed. 2d at 82, 106 S. Ct. at 1718.) Thus, fair venire selection is only the threshold requirement for properly selecting a jury. The State cannot be allowed, after seating a proper venire, to pervert the jury selection process by using peremptory challenges to ensure that minorities are kept off the jury. *Batson*, 476 U.S. at ___, 90 L. Ed. 2d at 82, 106 S. Ct. at 1718 ("the State may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at 'other stages in the selection process' ").

A logical extension of the language in *Batson* would prevent exclusion of black people from the jury through the use of peremptory challenges regardless of whether the defendant is a member of the excluded class, based on the juror's and the community's independent interests in a fairly selected jury, as well as the defendant's interest. Defendant has suggested the proper rationale for the extension of the principle: defendant's sixth amendment right to a representative cross-section of the community on the jury. A sixth amendment challenge is particularly appropriate in the present case, where the defendant is white and the excluded jurors are black, because a defendant need not be a member of the excluded class in order to raise a fair cross-section challenge. *Duren v. Missouri* (1979), 439 U.S. 357, 359 n.1, 58 L. Ed. 2d 579, 583 n.1, 99 S. Ct. 664, 666 n.1; *Peters v. Kiff* (1972), 407 U.S. 493, 33 L. Ed. 2d 83, 92 S. Ct. 2163 (white defendant could raise sixth amendment claim based on the exclusion of blacks).

Under the sixth amendment, a defendant is entitled to a fair cross-section of the community on the jury. (*Taylor v. Louisiana* (1975), 419 U.S. 522, 42 L. Ed. 2d 690, 95 S. Ct. 692.) This has been interpreted to guarantee that the jury venire be selected in a nondiscriminatory manner from a source fairly representative of the community, even though Taylor does not go so far as to guarantee a representative petit jury. But as already mentioned, *Batson* has added an additional dimension to this analysis: although a petit jury selected from a proper panel need not necessarily reflect a cross-section of the community, discriminatory tactics designed to manipulate the ultimate composition of the petit jury will no longer be tolerated. As the United States Court of Appeal for the Second Circuit phrased it in *Roman v. Abrams* (2d Cir. 1987), 822 F.2d 214, 226, 229:

> "[T]he sixth amendment guarantees only the *possibility* of a petit jury reflecting a cross section of the community and forbids the prosecutor to exercise his peremptories discriminatorily in a manner that eliminates that possibility *** [W]hat the sixth amendment guarantees to a defendant is not that he will have a petit jury of any particular composition but that he will have the *possibility* of a jury that reflects a fair cross section of the community. The prosecutor violates sixth amendment rights when he starts out to eliminate that possibility." (Emphasis in original.)

The *Roman* court also articulated the *prima facie* showing that should be required for a defendant to establish a violation of the sixth amendment right to the possibility of a fair cross-section on the petit jury. To establish a *prima facie* case, a defendant must show that " '(1) the group alleged to be excluded is a cognizable group in the community, and (2) there is substantial likelihood that the challenges leading to this exclusion have been made on the basis of the individual venireperson's group affiliation rather than because of any indication of a possible inability to decide the case on the basis of the evidence presented.' " *Roman*, 822 F.2d at 223, 225, quoting *McCray v. Abrams* (2d Cir. 1984), 750 F.2d 1113, 1131-32).

I raised an argument challenging the use of discriminatory peremptory challenges in the selection of petit juries as violative of the sixth amendment fair cross-section requirement, as well as arguments that such challenges are forbidden under our State constitution and that this court should exercise its supervisory authority to ensure that discriminatory tactics are not successful in *People v. Payne* (1983), 99 Ill. 2d 135, 140 (Simon, J., dissenting). I will not repeat those arguments here except to note the effect that *Batson* has on this court's prior decisions rejecting a sixth amendment prohibition on the discriminatory use of peremptory challenges.

In the wake of *Batson*, nothing precludes this court from holding that the use of peremptory challenges to exclude black jurors, even where the defendant is not black, violates the fair cross-section requirement of the sixth amendment. The opinions relied on by the majority—*Payne*, *People v. Williams* (1983), 97 Ill. 2d 252, and *People v. Gaines* (1984), 105 Ill. 2d 79—were based on precedent that has now been overturned. In those cases defendants argued that use of peremptory challenges to exclude black people from the jury violated both their fourteenth amendment rights to equal protection and their sixth amendment right to a fair cross-section of the jury. In support of their sixth amendment arguments, the defendants relied on *Taylor v. Louisiana* (1975), 419 U.S. 522, 42 L. Ed. 2d 690, 95 S. Ct. 692, in which the United States Supreme Court held that the sixth amendment right to a jury trial includes the right to have a petit jury selected from a representative cross-section of the community. In all of those cases, however,

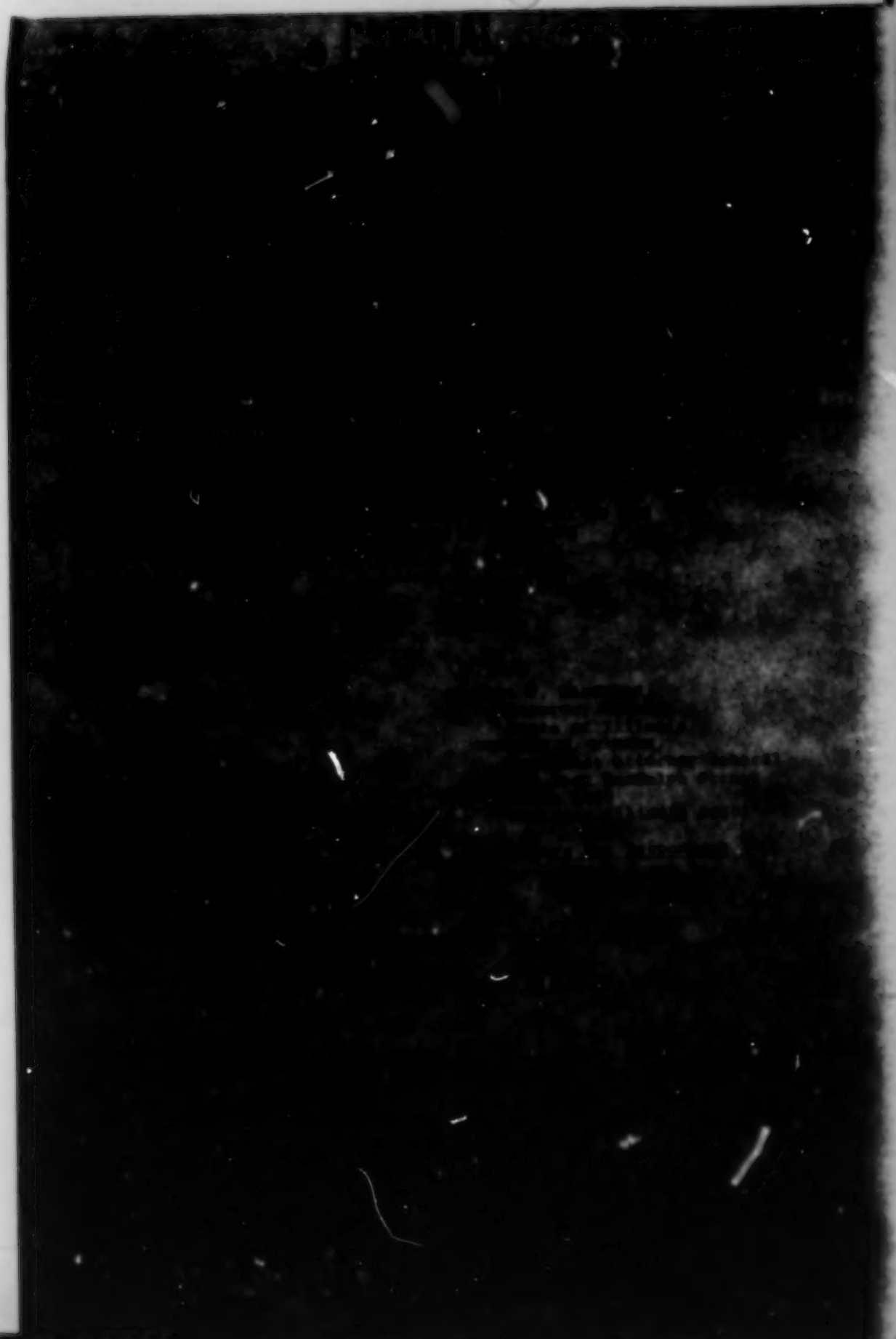
this court held that an earlier Supreme Court case, *Swain v. Alabama* (1965), 380 U.S. 202, 13 L. Ed. 2d 759, 85 S. Ct. 824, must be read into *Taylor* and therefore that *Swain* controlled the resolution of the peremptory challenge issue under a sixth amendment analysis. Under *Swain*, an equal protection case, to establish discrimination in the use of peremptory challenges, a defendant was required to demonstrate systematic and purposeful exclusion of minorities in case after case. *Swain* has now been overruled by *Batson*, thereby calling into question the holdings in those cases relying on Swain, including *Payne*, *Williams*, and *Gaines*. Thus, this court writes on a clean slate, and it would be incongruous for this court not to read the *Batson* decision into the sixth amendment analysis of *Taylor*—thereby prohibiting the use of peremptory challenges to exclude black persons from petit juries under the sixth amendment—after insisting for so long on reading *Swain* into *Taylor*.

It is not our concern to ponder the motivation for the State's attempt to exclude black persons from the jury in a particular case when the defendant is not black, but simply to ensure that it is not successful in doing so. Discrimination against black people is no less reprehensible simply because the defendant happens to be white. As acknowledged by the Supreme Court in *Batson*, black persons have an interest in serving as jurors independent from and in addition to the right of the defendant to a jury selected in a nondiscriminatory manner from a representative cross-section of the community, and interference with these rights should not be tolerated by this court for any reason.

In view of the long and unjustifiable history in this State of exclusion of black persons from jury service through the use of peremptory challenges (see *People v. Lewis* (1984), 103 Ill. 2d 111, 122 (Simon, J., dissenting) (listing cases in which peremptory challenges were used to exclude potential black jurors); *People v. Payne* (1983), 99 Ill. 2d 135, 152 (Simon, J., dissenting) (same), I urge this court not to wait until the United States Supreme Court explicitly denounces the use of peremptory challenges to exclude minorities from the jury where the defendant is a nonminority, but instead to take the initiative, under the unequivocal condemnation of such procedures in *Batson*, in outlawing all discrimination against

black persons in the jury selection system in this State. Some post-*Batson* courts have already held that discriminatory use of peremptory challenges is prohibited under the sixth amendment. See, *e.g.*, *Roman v. Abrams* (2d Cir. 1987), 822 F.2d 214; *Booker v. Jabe* (6th Cir. 1986), 801 F.2d 871; *Fields v. People* (Colo. 1987), 732 P.2d 1145.

At the very least this matter should be sent back to the trial court for a hearing to determine whether black persons were improperly excluded from service on the jury. For these reasons I respectfully dissent.



QUESTIONS PRESENTED FOR REVIEW

Whether the Illinois Supreme Court's ruling that the Sixth Amendment right to a jury drawn from a fair cross-section of the community does not extend to the use of peremptory challenges is in complete accord with Lockhart v. McCree.

Whether since petitioner's race is completely irrelevant to his fair-cross section claim, no benefit would result from this Court considering his claim together with that of appellant Teague's.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

DANIEL HOLLAND,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

JURISDICTION

Petitioner seeks to invoke the jurisdiction of the Court pursuant to 28 U.S.C. sec. 1257(3).

STATEMENT OF THE CASE

Petitioner, a white male, was charged with the aggravated kidnapping, rape, deviate sexual assault and armed robbery of Susan Bougearel, a teenager stranded on the road with her boyfriend due to car trouble. Jury selection for petitioner's trial was made from a venire of approximately 40 persons. (R. 586-587) The State exercised 12 peremptory challenges, excluding 10 white and two black prospective jurors. (R. 523,531,565,615,632,677,683,706,718) No blacks served on defendant's jury. The jury returned verdicts finding defendant guilty of all charges. Defendant was sentenced to concurrent extended terms of 60 years on the charges of rape and deviate sexual assault, and 30 years on the charge of aggravated kidnapping and 25 years for armed robbery, to run consecutive to the other sentences imposed.

Defendant appealed to the Illinois appellate court, which reversed his convictions and remanded to the trial court on the basis that petitioner's confession to the crimes was improperly introduced at trial. (People v. Daniel Holland, 147 Ill. App. 3d 323, 340, 509 N.E.2d 1230 (1986)). After accepting the cause for review on appeal by the State, the Illinois Supreme Court reversed the judgement of the appellate court and affirmed the trial court, holding that the statement was properly admitted. (People v. Daniel Holland, 121 Ill. 2d 136, 151-157, 520 N.E.2d 210 (1987)). The Illinois Supreme Court refused to address petitioner's claim, raised by him for the first time on appeal that the State's use of peremptory challenges to exclude two black jurors violated the rule in Batson v. Kentucky, 476 U.S.79, 90 L.Ed.2d 69, 106 S. Ct. 1712 (1986). The Supreme Court of Illinois found that petitioner, a Caucasian, had no standing to

assert a Batson violation. (121 Ill. 2d at 157) The Illinois Supreme Court, relying on its own prior holdings, further rejected petitioner's argument that the State's use of two peremptory challenges violated his sixth amendment right to trial by a jury drawn from a fair cross-section of the community. (121 Ill. 2d at 158)

Petitioner filed a petition for rehearing in the Illinois Supreme Court, which was denied.

REASONS FOR DENYING THE WRIT

I.

THE ILLINOIS SUPREME COURT'S RULING THAT THE SIXTH AMENDMENT RIGHT TO A JURY DRAWN FROM A FAIR CROSS-SECTION OF THE COMMUNITY DOES NOT EXTEND TO THE USE OF PEREMPTORY CHALLENGES IS IN COMPLETE ACCORD WITH LOCKHART V. McCREE.

Petitioner asks that a writ of certiorari issue so that this Court may consider, together with Teague v. Lane, No. 87-5259, the question of whether the fair cross-section requirement of the Sixth Amendment bars the prosecution from using peremptory challenges by excusing black jurors due to race. Counsel for the State of Illinois urge this Court to deny the writ because the Illinois Supreme Court's ruling refusing to extend the fair cross-section requirement to the State's use of two peremptory challenges is in complete accordance with Lockhart v. McCree, 476 U.S. 162, 90 L.Ed. 137, 106 S. Ct. 1758 (1986).

In Lockhart, in reversing the Eighth Circuit's ruling that "death qualification" of the jury violated McCree's sixth amendment right to a jury drawn from a representative cross-section of the community, this Court noted: "We have never invoked the fair cross-section principle to invalidate the use of either for cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large." 476 U.S. at 173. This Court specifically cited to its opinion in Batson v. Kentucky, 476 U.S. 79, 90 L.Ed.2d 69, 106 S. Ct. 1712, 1717, n. 6, (1986), where it observed that the limited scope of the fair

cross-section requirement is a direct and inevitable consequence of the practical impossibility of providing each criminal defendant with a truly "representative" petit jury. Id. at 174. This Court went on to express its reluctance to extend the fair cross-section requirement to petit jurors.

Thus, it is clear that the Illinois Supreme Court's ruling refusing to extend the fair cross-section requirement to the State's alleged discriminatory use of two peremptory challenges is in full accordance with this Court's rulings. The Illinois Supreme Court's ruling is also supported by the majority of the circuits of the Federal Court of Appeal that have considered the issue. See, Teague v. Lane, 820 F.2d 832 (7th Cir. 1987), appeal pending, No. 87-5259; United States v. Thompson, 730 F.2d 82, 85 (8th Cir. 1984), cert. denied 469 U.S. 1024; Prejean v. Blackburn, 743 F.2d 1091, 1103-1104 (5th Cir. 1984); United States v. Witfield, 715 F.2d 145, 146-47 (4th Cir. 1983); Weathersby v. Morris, F.2d 1493, 1497 (9th Cir. 1983), cert. denied 464 U.S. 1046. Cf. Willis v. Zant, 720 F.2d 1212, 1219, 1219 n. 14 (11th Cir. 1983), cert. denied 467 U.S. 1256. Therefore, petitioner's writ should be denied.

II.

SINCE PETITIONER'S RACE IS COMPLETELY IRRELEVANT TO HIS FAIR-CROSS SECTION CLAIM, NO BENEFIT WOULD RESULT FROM THIS COURT CONSIDERING HIS CLAIM TOGETHER WITH THAT OF APPELLANT TEAGUE'S.

Petitoner contends that because he is white and appellant Teague is black, this Court should issue a writ of certiorari so that it might consider his fair cross-section claim together with that of appellant Teague's. The People maintain that it would be a waste of this Court's resources to grant the writ since the theory of petitioner's claim, just as that of appellant Teague's, is such that petitioner's race is completely immaterial. Further, even if this Court were to break with established precedent and find that the Sixth Amendment guarantee to a jury drawn from a representative cross-section of the community applies to the State's use of its peremptory challenges, no violation could be shown in this case, where the State used only two peremptory challenges to excuse black prospective jurors and 10 challenges to excuse whites. Thus, the writ should be denied.

Petitioner urges, exactly as does appellant Teague, that this Court extend a defendant's sixth amendment right to a jury drawn from a representative cross-section of the community to the State's alleged discriminatory use of its peremptory challenges. Obviously, the Sixth Amendment applies equally to all persons regardless of their race and the State has not contended otherwise. Thus, the fact the petitioner is white while appellant Teague is black is immaterial to the Court's

resolution of this issue, and it would be a waste of this Court's resources to grant petitioner's writ, which is solely based on this issue, merely because he is white.

Further, even if this Court were to break with past precedent and extend the Sixth Amendment right to a jury drawn from a fair cross-section of the community to the selection of the petit jury, petitioner Holland would still not be entitled to relief since he could not show that the State's use of its peremptory challenges violated that requirement where prosecutors used only two peremptory challenges to exclude blacks, while using 10 to exclude prospective white jurors.

In conclusion, it would be a waste of this Court's resources to grant petitioner's writ since his claim is identical to that being considered by this Court in Teague v. Lane, No. 87-5259, and his race is immaterial to the resolution of the issue raised. Further, even if this Court were to adopt the new rule urged by petitioner and appellant Teague, petitioner would not qualify for relief since prosecutors used only two challenges to excuse prospective black jurors. Therefore, the writ should be denied.

CONCLUSION

The People of the State of Illinois respectfully request that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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(4)

No. 88-5050

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DANIEL HOLLAND,

Petitioner

v.

ILLINOIS,

Respondent

On Writ of Certiorari to the Supreme Court of Illinois

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED JUNE 3, 1988
CERTIORARI GRANTED FEBRUARY 27, 1989

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	ITEM
July 14, 1981	Trial commences with jury selection
July 15, 1981	State use peremptory challenges to remove both black prospective jurors to which counsel objects but which objection, after hearing, is denied.
July 19, 1981	Jury convicts petitioner of rape, deviate sexual assault, aggravated kidnapping, and armed robbery
August 20, 1981	Court sentences petitioner to concurrent and consecutive terms of imprisonment
December 4, 1981	Petitioner is allowed to file late notice of appeal
August 29, 1986	Appellate court reverses convictions and orders retrial
December 21, 1987	Supreme Court reverses appellate court and affirms criminal convictions

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT-MUNICIPAL DIVISION
THIRD DISTRICT

ILLINOIS

v.

DANIEL HOLLAND

JURY SELECTION PROCEEDINGS

July 15, 1981

[529] THE COURT: Kindly move down, ladies and gentlemen.

THE CLERK: 2102.

MS. CONLEY,

a prospective juror, was examined as follows:

EXAMINATION

By the Court:

Q Ma'am, what is your name?
A Conley.
Q That's C-o-n-l-e-y?
A Right.
Q Miss Conley, you reside in Chicago, Illinois?
A Right.
Q How long have you lived at that address?
A Six years now.
Q And with whom do you reside there?
A Parents.

Q And you're a student?
A No, not now. I graduated in June.
Q And what school did you attend?
A Northeastern.
Q And please raise your voice a little more.
A Northeastern.
Q And what degree did you get?
[530] A A B.S.
Q What is the nature of your parent's employment?
A They work at the Rockford Paper Mills. My father's in maintenance, and my mother packs boxes in the packing department.
Q Thank you. And you have never served as a juror before, is that correct?
A No, I haven't.
Q And Miss Conley, do you know any of the lawyers?
A No.
Q Do you know the defendant?
A No, I don't.
Q Have you heard or read anything about this case?
A No, I haven't.
Q Do you have any friends or relatives on any police force or in the State's Attorney's Office?
A No.
Q Have you or any member of your family, any close friend, ever been the victim of a crime?
A No.
Q Is there anything about the nature of the charges in this particular case that in any way would prevent you from rendering a fair and impartial verdict in this case if you were selected as a juror?
[531] A No.
Q Do you have any bias or prejudice against a person simply because he is charged with a crime?
A No, I don't.
Q As you sit there right now, Miss Conley, do you know of any reason whatsoever why you could not render

a fair and impartial verdict in this case if you were selected as a juror?

A No.

Q Thank you, Miss Conley.

Mr. Bredemann?

MR. BREDEMANN: People would excuse Miss Conley.

THE COURT: Miss Conley would you kindly report to the officer, please?

THE CLERK: 1637.

MR. BREDEMANN: Thank you, Ma'am.

THE COURT: Please move down, ladies and gentlemen.

• • • •

[558] VIRGIL MOSLY,

a prospective juror, was examined as follows:

EXAMINATION

By the Court:

[559] Q May we have your name?

A Virgil Mosly, Jr.

Q Mr. Mosly, kindly keep your voice up. That's M-o-s-l-y?

A Yes.

Q Mr. Mosly, you reside in Chicago?

A Yes.

Q How long have you lived there at that address?

A Three months.

Q And before that, Mr. Mosly, did you also reside in Chicago?

A Yes.

Q How long were you at your last address?

A Eleven years.

Q Thank you. With whom do you reside?

A My wife.

Q And you work for Polk Brothers as an inventory clerk?

A Yes.

Q How long have you been with Polk Brothers, please?

A About two months.

Q And before that, what was the nature of your employment?

[560] A I was in school.

Q What school is that?

A Northeastern.

Q And what was your major, please?

A I was just a general student.

Q And how long were you at Northeastern, please?

A About half a year, one semester.

Q And it appears that your wife is with Allstate Insurance in a clerical capacity, is that correct?

A Yes.

Q How long has she been in that capacity?

A A year and a half.

Q Mr. Mosly, do you know any of the lawyers?

A No, sir.

Q Do you know the defendant, Mr. Holland?

A No, sir.

Q Have you ever heard or read anything about this case?

A No, sir.

Q Have you any friends or relatives in the State's Attorney's Office or any police force?

A No, sir.

Q Mr. Mosly, do you have any bias or any prejudice against a person simply because he is charged with a crime?

[561] A No, sir.

Q And is there anything about the nature of the charges in this particular case that would cause you to feel that you couldn't be fair and impartial in this case?

A No, sir.

Q Now, sir, you indicate that a member of your immediate family or very close friend had been the victim of a crime.

A Yes.

Q Would you please tell us who that was?

A It was a friend of mine. It was a victim of a murder.

Q I see. When was that, sir?

A About three weeks ago.

Q And that was in Chicago?

A Yes.

Q Is there anything about that very tragic experience that in any way could cause you to feel that you could not be fair and impartial in this case?

A No, sir.

Q Have you or any member of your family or a close friend ever been accused of a crime?

A No, sir.

Q As you sit there right now, Mr. Mosly, can you [562] think of any reason whatsoever why you could not render a fair and impartial verdict in this case if you were selected as a juror?

A No, sir.

Q Thank you, Mr. Mosly.

• • • •

[565] THE COURT: Mr. Bredemann? Ms. Keenan?

MS. KEENAN: We excuse Mr. Mosly.

THE COURT: Very well.

Mr. Mosly, kindly report to the officer, sir.

THE CLERK: 1636.

MR. ROCCO: Thank you, Mr. Mosly.

MR. BREDEMANN: Thank you, sir.

• • • •

[Supp. II 2] THE COURT: Counsel, we will hear arguments, now, on your motion for exclusion. I will hear that now. There's no reason to waste this time. It's valuable and I will hear it, now.

MR. ROCCO: Your Honor, I thought we'd wait until we saw the other array of jurors.

THE COURT: No, we're going to hear that, now. We'll hear the arguments in open court.

MR. BREDEMANN: Judge, we've had the witnesses sitting here all day. Can I have ten minutes?

THE COURT: Yes. I want you back. I'm not going to waste any of this valuable time. We have a good afternoon.

Defendant may remain with his counsel. I will have forty jurors here. I'm sure we'll be able to get somebody.

(Whereupon a recess was taken, after which the following proceedings were had outside the presence and hearing of the prospective jurors:)

THE COURT: Do you wish your client present, Counsel?

MR. ROCCO: Yes, your Honor.

[Supp. II 3] THE COURT: All right.

(Whereupon a short pause ensued as the defendant entered the courtroom, after which the following proceedings were had herein:)

THE COURT: Now, the record shall indicate the defendant's present in court; defense counsel is present. Of course, we're outside the presence of any prospective jurors or any jurors; and the State's Attorney is present.

The record shall reflect that defense counsel's filed a motion—

Counsel, would you reiterate your motion for the record?

MR. ROCCO: Yes, your Honor. I made an oral motion to object to the systematic exclusion of blacks by the State. At yesterday's hearing, I believe there was—if my memory serves me correctly—thirty prospective jurors brought in. I may be off one or two. Out of those thirty, there were only two blacks that were brought up.

I had previously argued that the defendant has a right to be—to a jury to be drawn from a representative cross section of the community [Supp II 4] and be tried by

a representative cross section of the community. The State has systematically excluded the two blacks. It did not even ask them one question; just took one look at them and excused them pursuant to their right to a peremptory challenge.

My motion, Judge, is not that of a mistrial, it's for the County of Cook to provide me with some blacks out of thirty-five—

THE COURT: Are you suggesting that the jurors be hand-selected by race, Counsel, and sent here in ratios or quotas?

MR. ROCCO: No, your Honor. I'm saying I don't know what pool they select these from.

THE COURT: Are you challenging the basis, Counselor, of how jurors are selected?

MR. ROCCO: I'm not selecting the array, your Honor. What I'm stating is this: that my client is entitled to a representative cross section of the community. I don't know how they've selected them. What I'm saying is this: that I'm raising the objection because in this district it appears that only whites are selected on some basis and no blacks are available to a defendant.

THE COURT: You made that conclusion, Counsel, [Supp. II 5] because two black jurors were here out of forty?

MR. ROCCO: That's correct.

THE COURT: Is that the basis for your conclusion, Counselor?

MR. ROCCO: Right, your Honor.

THE COURT: Okay.

Mr. State's Attorney, do you wish to respond to two arguments: one, an alleged systematic exclusion by you in excusing Miss Conley (phonetically spelled) and Mr. Mosely (phonetically spelled) yesterday, who were prospective jurors; and the general selection of jurors being incident to this district?

MR. BREDEMANN: Yes, Judge. The second point, I think, is moot. The time to challenge the array is when

it's brought in and not subsequently. I think it's untimely.

As to the first point, this elimination or this exemption from jury duty by the use of our peremptory challenge, was not based upon their race. That was not the intent of the State in doing so.

Secondly, I believe Justice Rehnquist addressed this problem approximately five years ago in an opinion and I believe his conclusion, in that particular matter, I think deals with this issue. [Supp. II 6] It's a question of constitutional law; therefore, I believe his motion should be denied.

THE COURT: Very well.

Counsel, it's your motion. Do you have anything further to say?

MR. ROCCO: Your Honor, I would just state this: that in the People vs. Wheeler, a 1978 California case, *583 Pacific 2nd 748*, it involved where the defendants were black. However, the same type of argument can be made where the defendant is white.

There's also the Commonwealth vs. Soares, a 1979 Massachusetts case, *387 Northeast 2nd 499*. The holding in those two cases was the same: the use of peremptory challenges to remove prospective jurors on the sole basis of group bias—meaning race—violates the right to trial by a jury drawn from a representative cross section of the community, specifically in Article 1 Section 6 of the California Constitution, which guarantees an accused the inviolate right to trial by jury.

We also relied on Taylor, a 1955 case, *419 U.S. 522*, which extended to the State through the Fourteenth Amendment the representative cross section requirements of the Sixth Amendment.

[Supp. II 7] The Soares decision relied on the language in Wheeler and on the cross section requirements of Taylor.

More specifically, the Court in Soares found the prosecutor's conduct a contravention of Article 12 of the

Massachusetts Declaration of Rights which guarantees the right to a trial by a jury of one's peers. Here in our case the defendant has an identical protection under the Sixth Amendment against the systematic removal of blacks from the venire.

Furthermore, Article 1 Section 8 of the Illinois Constitution corresponds closely to the language of the Sixth Amendment, as well as to the articles of the California and Massachusetts Constitutions which were relied upon to reverse the defendant's conviction. This is in Soares and Wheeler.

After reviewing the protections offered by the Federal and State Constitutions in favor of a jury drawn from a cross section of the community, the Wheeler Court suggested a method for determining whether jurors were eliminated on the basis of their group race, rather than because of any specific bias. The method suggested in Wheeler and adopted in Soares included a review of the facts to show, number one, [Supp. II 8] that the prosecutors struck most or all of the members, cognizable group from the venire.

In this, our case, your Honor, it was only two. He struck both of them.

Two, that he used a disproportionate number of peremptory challenges against group members. He used two of them to strike the only two.

That the jurors shared only one characteristic, the ones that were stricken, the black race, as it was in Wheeler or Soares.

I ask the Court to recall what the prosecutor did in our case. The prosecutor failed to engage the jurors in more than a desultory voir dire. In our case there was no voir dire. The prosecutor looked at the prospective jurors that were black, went up to your Honor and said, "I—we—the State excuses these people." That was Miss Conley and Mr. Mosely, the only two blacks.

Applying these guidelines to the facts of the instant case, it's evident that the jurors were eliminated solely

because of their black race. Actually, Judge, we didn't get really into what their background was, as I recall. I would have to consult my notes to determine their backgrounds.

THE COURT: I also have my notes, Counsel.

MR. ROCCO: They were just ordinary people, as I recall; nothing unusual about them. Nothing that—

THE COURT: Didn't Mr. Mosley have a friend who was murdered approximately three months or three weeks just immediately prior to his questioning as a juror?

MR. ROCCO: Right, and if that was the case, your Honor, that would seem, by inference, that it would favor the State more than the defense.

THE COURT: However, it is a factor that was revealed. Who it may ultimately avail itself to is yet to be seen, of course.

MR. ROCCO: But I'm talking about his background, Judge. That's something that's up to conjecture, but not the fact that he's a college student. I think he was working. He appeared to be a clean-cut individual.

THE COURT: Yes, Counsel, you're assuming, again, that there was some individual basis. All right, you're talking, again, about individual characteristics as opposed to being systematically excluded. That would, apparently, not be relevant if it were a systematic exclusion.

MR. ROCCO: The one characteristic was their race, your Honor.

[Supp. II 10] THE COURT: All right.

MR. ROCCO: It was obvious that counsel did not even consider what their background might be when he used his two challenges. It would only lead the defense to conclude that these black jurors were eliminated simply because of their race and not any specific bias. It would be hard to come by, Judge, to believe that the State would excuse somebody who had a friend that was murdered.

THE COURT: Very well, Counselor. I've considered your motion. Do you have anything in addition?

MR. ROCCO: Consequently, Judge, the prospective jury, so far, has not been a representative cross section

of the community and my defendant's Sixth Amendment right to a jury trial has been violated, as well as his right to an impartial jury under the Illinois Constitution.

THE COURT: So, what's the bottom line, Counsel? What are you seeking?

MR. ROCCO: I'm asking the Court that if—you know, I don't know what way this is—we have not had any other races here except white.

THE COURT: I see.

MR. ROCCO: Okay?

[Supp. II 11] THE COURT: I see.

MR. ROCCO: And I think—

THE COURT: Is that your argument, Counselor?

MR. ROCCO: —my man actually has a right to a cross section of the community.

THE COURT: You assume there's, apparently, a conspiracy to deprive him of anything other than Caucasian members?

MR. ROCCO: I'm not making such a representation.

THE COURT: Just be very specific in your argument.

MR. ROCCO: I'm trying to be, Judge; I'm trying to be.

THE COURT: Fine. Don't make allusions; be specific. Tell me, if, in fact, you feel something is being done.

MR. ROCCO: I didn't mention conspiracy.

THE COURT: No, but you're indicating there's no other minority other than Caucasians.

MR. ROCCO: I'm saying whatever method is used for this, I'm asking the Court to investigate it and if, within the Court's power, to secure thirty-five people for tomorrow morning, that truly represent the cross section of the community.

THE COURT: Are you asking this Court to hand-pick jurors that may, in your view, Counselor, constitute [Supp. II 12] a cross section? In other words, so many of each particular ethnic background?

MR. ROCCO: I'm asking for a cross section of the community, not any particular number. Whatever is there.

THE COURT: Do you have anything further, now, Counsel?

MR. ROCCO: That's all, your Honor.

THE COURT: I've considered your argument and I've seen the jurors come here. I see absolutely not a scintilla of the basis for your—to support your argument.

As a matter of fact, I have considered People vs. Wheeler. That's reported, also, at *22 California 3rd 258*. They allowed the defendant to establish a prima facie case of discrimination and shift the burden merely upon that allegation, and it makes the State show that they were—why they were discriminatory. In other words, it puts the burden upon the State to establish by testimony that they had not been discriminatory; except Illinois expressly rejects that California doctrine.

I bring both counsels' attention to these cases: first, People vs. Fleming, a First District [Supp. II 13] case decided November of 1980 at *91 Illinois Appellate 3rd 99*. There the State exercised a peremptory challenge against a black juror but that is not violative of the constitutional rights of an impartial jury in a felony prosecution against the black defendant.

The defendant in this case is Caucasian. The State has ten peremptory challenges. The defense has ten peremptory challenges. This is a penitentiary offense and that's the statutory allotment.

The State, at the time it excused Mr. Mosley, that was the State's fifth challenge. Mr. Mosely was their fifth.

Miss Conley, apparently, was the third. Miss Conley and Mr. Mosley were both excused.

This Court has conducted a voir dire of all of the jurors, including not only Mosley and Conley, but each and every one of the others, all forty, before I permitted and exercised my permission to permit the State and defense to have any voir dire whatsoever pursuant to Jack-

son. It's purely in my province, but I chose to have you have a voir dire. After I voir dired everyone, the State elected to exclude those two.

The State subsequently used all ten of [Supp. II 14] their peremptory challenges; the defendant merely five. So, the basis I have to assume was after they had an opportunity to reflect upon the voir dire, that voir dire I asked, and record is complete as to what was asked: where they reside; how long they resided there; their education; whether or not they had any bias or prejudice; who they reside with; the nature of their employment; how long they had been in that employment; whether or not the spouse is employed. And the record is replete with the nature of the inquiry that this Court conducts and I regard it to be rather thorough.

Now, People vs. Fleming based part of their opinion—also a case called *Swain vs. Alabama, 965, reported at 380 U.S. 202*. That holds where there's no showing of a systematic exclusion of a particular racial group from sitting on juries, prosecutors' motives may not be inquired into when he excludes members of that group by use of his peremptory challenge. There is a presumption that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the Court.

And in the Illinois Courts in Fleming—and they incorporated Swain vs. Alabama—expressly [Supp. II 15] rejected California Supreme Court rationale that you alluded to in People vs. Wheeler.

I might also point out, Counsel, that there are two other cases: People vs. King, 1973, by our Illinois Supreme Court at *54 Illinois 2nd 291*; and People vs. Butler, 1970 at *46 Illinois 2nd 162*; also by our Illinois Supreme Court, and a third case, People vs. Harris, 1959, our Illinois Supreme Court at *17 Illinois 2nd 446*.

Based upon a totality of the arguments that I have heard, your oral motion which I will give you leave to reduce to writing, Counselor, the State's response, my observations of the witnesses, the voir dire that I conducted, the points and authorities I rely upon, your motion being and the same hereby is denied and denied in toto and all respects.

Now, this cause stands adjourned until tomorrow. I expect both sides to be ready. We will have enough jurors to proceed.

(Whereupon said matter was continued until Thursday, the 16th day of July A.D. 1981.)

ILLINOIS APPELLATE COURT
FIRST DISTRICT
FIFTH DIVISION

August 29, 1986

81-2895

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee

vs.

DANIEL HOLLAND,
Defendant-Appellant

Appeal from the Circuit Court of Cook County

Honorable Edward M. Fiala, Judge Presiding

JUSTICE PINCHAM delivered the opinion of the court:

Following a jury trial, defendant was found guilty and was sentenced to concurrent, extended terms of imprisonment of 60 years for rape, 60 years for deviate sexual assault and 30 years for aggravated kidnapping. Defendant was also sentenced to a consecutive, extended term of 25 years for armed robbery. The trial court ordered that these sentences were to be served consecutive to any sentence the defendant would receive as a result of any parole violation.[1]

[1] Some years previous, defendant was convicted of armed robbery and was sentenced to six to 18 years' imprisonment, of which he served three years and was on parole when the above offenses were committed and the sentences imposed.

On appeal, defendant urges for reversal that: (1) he was denied his constitutional right to a jury drawn from a fair cross-section of the community; (2) his confession should have been suppressed; (3) the element of force in the armed robbery was not proven; (4) the consecutive sentences were improper; and (5) defendant was denied effective assistance of counsel.

The complainant's testimony at trial revealed that on May 4, 1980, at approximately 12:00 midnight, the complainant and her boyfriend left a party, riding in her boyfriend's car. The complainant drove. The car suddenly had a flat tire and the complainant pulled the car over to the shoulder of the road. They discovered that the spare tire was also flat. After waiting an hour for assistance, the couple decided to sleep in the car. They awakened at dawn and began to walk on the shoulder of the road. Shortly afterward, defendant pulled up in his car, asked what was wrong, and offered to give the complainant and her boyfriend a ride home. Accepting the invitation, the couple got in defendant's car. The complainant sat in the front seat and her boyfriend sat in the back seat.

After driving for a while, defendant pulled off the road and stopped the car, he grabbed the complainant, brandished a knife against her throat, ordered the boyfriend to get out of the car, and threatened to kill them if the boyfriend did not do so. The complainant's boyfriend got out of the car. The complainant pleaded with the defendant to release her. The defendant said he would let her go when he was through with her. He pulled her nearer to him and continued driving while holding the knife under the complainant's arm. Defendant then pulled his car into a parking lot. The complainant was ordered to take off her clothes or get "cut up." As the complainant disrobed, the defendant cut her brassiere and forced her to perform an act of oral copulation.

During this ordeal, defendant complained that the complainant was not sexually performing the way he wanted and he cut the complainant's upper thigh with his knife. The complainant testified that the defendant threatened to kill her if she did not do what he wanted. They got back in the car.

The defendant continued driving. The defendant then pulled into an alley where he and the complainant again got out of the car. The defendant forced the complainant to have intercourse with him twice and to perform oral copulation on him. The complainant testified that she did not attempt to leave nor did she cry out for help because she was only partially clothed. The defendant took the complainant's money (approximately $60), driver's license and school identification card and threatened to kill her if she reported the incident to the police. The defendant then allowed the complainant to get dressed outside the car and leave. The complainant testified that as she walked away she turned and noticed that the defendant's car did not have a rear license plate. The complainant ran to a grocery store where she used the washroom and called home. Her brother came to pick her up and immediately drove her to a police station. After reporting the incident to the police, the complainant was taken to a hospital. From the hospital, the complainant was driven to the places she had been taken by the defendant and then went back to the police station where she identified the defendant's picture from a group of photographs.

During the time the complainant was with the defendant, the complainant's boyfriend called the police. The police radioed a description of the defendant and the type of car he was driving. Defendant was arrested at about 8:15 a.m. when he was stopped by the police for driving without a rear license plate. The defendant did not have a valid driver's license. He was taken to the Schiller Park police station where a hunting knife, the

complainant's high school identification card and $58.00 were taken from him.

The defendant was taken from the Schiller Park police station to the Des Plaines police station where he was interviewed by two assistant State's Attorneys and a police officer. At approximately 2:30 p.m. at the Des Plaines station, the defendant confessed to sexually assaulting the complainant.

Prior to trial, the trial court sustained defendant's motion to suppress the defendant's initial confession made at the Schiller Park police station. The court found that "there was physical confrontation between the Schiller Park police officers and the defendant. Under the circumstances, when it was that this occurred, it is not really necessary for me to make a determination * * *. I feel that that degree of physical confrontation contaminates any statements defendant would have made at the Des Plaines police station were denied."

Defendant contends that his constitutional right to a jury drawn from a fair cross-section of the community was denied because a disproportionately small number of blacks were available for *voir dire* jury selection. Over 40 jury veniremen, of whom two were black, were assembled, from which the jury was selected. The State used two peremptory challenges to excuse the two blacks and 10 peremptory challengers to exclude white jurors. There were no black members of the jury. Defendant is Caucasian.

The State contends that defendant failed to preserve this issue for review by failing to raise an objection prior to the *voir dire* examination. The State points out that Ill. Rev. Stat. 1981, ch. 38, par. 114-3 (a) and (b) provides:

> "(a) Any objection to the manner in which a jury panel has been selected or drawn shall be raised by a

motion to discharge the jury panel prior to the voir dire examination. * * *.

(b) The motion shall be in writing supported by affidavit and shall state facts which show that the jury panel was improperly selected or drawn."

The State contends that (1) contrary to the requirements of this statute, defense counsel made an objection to the jury array *after* the *voir dire* examination had begun and a panel of jurors sworn in; (2) although the court granted defense counsel leave to file a written motion, defense counsel failed to do so; (3) there is no written motion in the record, supported by an affidavit, challenging the selection of prospective jurors; and (4) defendant's motion for a new trial failed to raise the issue of the alleged improper jury array.

The question of whether it is a constitutional violation for the State to use its peremptory challenges to systematically exclude blacks from the jury solely because of their race was recently decided on April 30, 1986 by the United States Supreme Court in *Batson v. Kentucky* (1986), —— U.S. ——, 90 L. Ed. 2d 69, 106 S. Ct. 1712. In that case, the Supreme Court held that the Equal Protection Clause of the fourteenth amendment forbids the State through its use of peremptory challenges from excluding jurors solely on account of race. We do not rule on this issue for the reasons that (1) we reverse the case at bar on other grounds and remand for a new trial; (2) the parties and trial judge in the instant case did not have the benefit of the *Batson* decision when the alleged peremptory challenge improprieties occurred; and (3) with *Batson* now controlling, it is highly unlikely that this issue will recur on retrial.

Defendant next contends that it was error for the trial court to admit his confession because the police failed to inform him while he was in custody at the Des Plaines police station that his attorney, Anthony Rocco, had

called the station in an effort to contact him. At the pretrial hearing on defendant's motion to suppress his confession, Assistant State's Attorney Ira Raphaelson testified for the State that he arrived at the Des Plaines police station between 1 p.m. and 1:30 p.m. and that he interviewed the defendant at about 2 p.m. Assistant State's Attorney Howard Friedman and Officer John Meese were also present at this interview. Raphaelson testified that he told the defendant that he and Friedman were not Public Defenders and that he informed the defendant of his *Miranda* rights. According to Raphaelson, defendant responded that he understood his rights and was willing to talk. Raphaelson further testified that at about 2:30, he, Officer Meese and Assistant State's Attorney Friedman had a second conversation with the defendant, during which time the defendant gave a confession of his involvement in the offenses.

Raphaelson testified that he did not talk to defendant's attorney, Attorney Rocco, until after the defendant confessed and that it was about 3 p.m. when he talked to Rocco on the telephone. Raphaelson testified that Rocco told him "that he had something to do with the family of Daniel Holland," and wanted to know what charges were being filed against his client. Raphaelson told Rocco that he "was not free to divulge that information," and that no decision had been made on what charges would be filed against defendant.

Cross-examination of Raphaelson disclosed that he had a telephone conversation with Officer Bauer of the Schiller Park police station before Raphaelson interviewed the defendant at the Des Plaines station. Raphaelson explained on cross-examination that when the defendant was stopped for a traffic violation, the defendant had a weapon and that Bauer "was seeking charges [against the defendant] for a felony unlawful use of weapons." Later that morning, Raphaelson further testified, he again spoke to Bauer who "indicated * * * that

they believed that Mr. Holland [defendant] was a suspect * * * in a rape matter in Des Plaines." Defendant's attorney, Anthony Rocco, then asked Raphaelson the following questions on cross-examination:

"Q Now, you say you first saw the defendant, Daniel Holland at approximately 2:05 p.m. that day is that right?

A I may have taken a look at him before I spoke to him. It would have been approximately that time.

Q And that is the first time you had a conversation with him, right?

A That is correct.

Q And he didn't ask for any attorney, is that correct?

A No, he did not.

Q *All right, and were you aware of the fact that I was attempting to communicate with Mr. Holland during that point in time*?

A At that point in time, no.

Q Officer Meese never said that to you?

A No, I don't believe so.

Q Officer Meese ever tell you that I talked to him regarding Daniel Holland?

A He probably did mention it." (Emphasis added).

Raphaelson also testified on cross-examination that he interrupted his interview of the defendant and had a conversation in another room. Friedman, the other assistant State's Attorney came back into the interview room and when Raphaelson returned, he resumed his interview of the defendant in the presence of Friedman and Officer Meese. Defendant's attorney, Rocco, again queried Raphaelson on cross-examination as follows:

"Q Did Investigator * * * Meese ever tell you I had phoned at that time?

A No.

Q Did he ever tell you that I asked that I'd be given an opportunity to speak to my client and see him before any interrogation took place? That I had been retained?

A There was some discussion at some point that an attorney or someone claiming to be an attorney had called.

Q Did he ever tell you I left my phone number with him to call me back?

A I don't recall.

Q Did he ever tell you the name of the person who claimed to be the attorney for Daniel Holland?

A No."

Testifying further on cross-examination, Raphaelson stated that he concluded the interview of the defendant at about 2:55 and that at approximately 3:00 he talked on the telephone to Rocco, who had called the Des Plaines police station. Raphaelson testified that Rocco may have told him in this telephone conversation that defendant's family wanted him to represent the defendant but that the only inquiry Rocco made to Raphaelson was to ask what charges would be brought against the defendant. Raphaelson testified that he again talked to Rocco, this time in person, at about 3:45 p.m. in the lobby of the Des Plaines police station. Raphaelson told Rocco what charges Raphaelson had approved to be brought against the defendant, which charges he approved between 3:30 and 3:45 p.m.

Detective Meese of the Des Plaines police station next testified for the State at the pretrial hearing on defendant's suppression motions. Meese stated that he talked to defendant's attorney, Anthony Rocco, between noon and 12:15 and that Rocco requested that he be notified if the defendant was transported to the Des Plaines police station for a lineup. Meese said that Rocco asked whether defendant had been charged with an offense in Des Plaines and that Meese answered "no," Meese

testified he called Rocco's home between 2:30 and 2:45 p.m. to notify Rocco that a lineup would be held, but Rocco was not home.

On cross-examination, Rocco asked Meese whether he recalled that Rocco had asked, "Please call me as soon as Mr. Holland arrives at the station." Meese answered, "You requested to be called if he was transported to our station and was going to be put into a lineup." The following cross-examination occurred:

"Q And you said you tried to call me about 2:35 to 2:45 that afternoon, is that correct?

A That is correct.

• • • •

MR. ROCCO: Were you aware of the fact *I called the police department also at 2:00 o'clock p.m. that day*?

A No, I'm not.

Q Were you informed of the fact *I formally requested to speak to my client at that time again*?

A No, I was not.

Q And were you aware of the fact that your department told me that my client was being processed and could not come to the telephone?

A I'm not aware of that.

Q Were you aware of the fact that *I again formally requested that the law authorities present in the station not interrogate my client until I was present and had an opportunity to confer with my client beforehand and during any interrogation*?

A I'm not aware of that.

Q Are you aware of the fact that I arrived at that station at 3:47 p.m. that day?

A No, I'm not.

Q Were you aware of the fact that I asked to see my client, formally requested to see and speak with him and was told that I would have to go into a waiting room and wait ten to twenty minutes before he came out?

A I'm not aware of that.

Q Were you aware of the fact I had to interview my client in a small room through a glass wall and speak to him through metal grating?

MR. BREDEMANN [assistant State's Attorney]: Objection.

THE COURT: Basis?

MR. BREDEMANN: Irrelevant, Judge, after the statement.

THE COURT: I'm going to leave it in, if he knows. Overruled. You may answer.

THE WITNESS: I'm not aware of where you talked to the man." (Emphasis added.)

After the State rested on the hearing of defendant's motion to suppress his statements, defendant was given leave to reopen the hearing. Defendant called to testify Schiller Park police officer Robert Bauer, who arrested the defendant, Patricia Holland, defendant's wife, and defendant Daniel Holland. Defendant's attorney, Anthony Rocco, also testified at this time.

Rocco stated that on May 4, 1980 at about 3:47 p.m., he went to the Des Plaines police station and asked to see the defendant. Rocco said he "was ushered into this little room. [The defendant] was brought in on the other side of the glass. • • • I detected that he had a limp when he came into the room. • • • I introduced myself to him, because this was the first time I had ever met him. He introduced himself to me." Rocco testified that the defendant started to complain about his chin and said he had been beaten in the Schiller Park police station, had been hit "in areas where he could not be seen" and that his ribs were hurting him. Rocco said the defendant told him that "they" had beaten him on his right knee with a billy club or a night stick and when Rocco asked to see the injury, defendant rolled up his

pants to reveal his right knee which "was really discolored quite a bit." Rocco said defendant was taking pain pills.

Following Attorney Rocco's testimony, he and Assistant State's Attorney Bredemann argued defendant's motion to suppress defendant's confession and the evidence seized from him when he was arrested. During Rocco's argument, Rocco again accused the officers at the Schiller Park station of beating the defendant and Officer Meese of not honoring Rocco's request to be present during any interrogation of defendant.

In ruling on defendant's motion, the trial court stated:

> "[T]here is no question that some degree of confrontation took place in Schiller Park because the officers in those cases are complainants, and there is no question that the defendant apparently sustained some injury. Whether or not he sustained those in being apprehended as a consequence of the particular traffic stop in that instance, or whether he was beaten shall be for me to weigh upon, but there was physical confrontation between the Schiller Park police officers and the defendant. Under the circumstances, when it was that this occurred, it is not really necessary for me to make a determination.
>
> I find, and I do find that inasmuch as there was a physical, apparently very severe physical confrontation from that night, had obtained leave and obtained a complaint, and have filed information alleging aggravated battery.
>
> Defense counsel observed physical injuries to the right knee of the defendant, and signs defendant's complaint after 3:47 on May 4, 1980 at the Des Plaines police station.
>
> I feel that that degree of physical confrontation contaminates any statements defendant would have made at the Schiller Park Police Station, and accordingly any statements made relevant to this cause made by the defendant in the Schiller Park Police Station before this Court are hereby suppressed, and suppressed in toto."

Regarding the defendant's statements he subsequently made at the Des Plaines station, the court found that the defendant had received *Miranda* warnings "in full or in part at least five times, and that he was not a neophyte, he had been exposed to police departments on prior other occasions * * *," and that no physical cruelty was proven to have been exerted by the Des Plaines police. The court denied the defendant's motion to suppress the statements he made at the Des Plaines police station.

Defendant contends that since the trial court found that his statements that were made at the Schiller Park police station were the product of police brutality and therefore involuntary, the trial court should have also found that the brutality and involuntariness carried over to the statements the defendant made shortly thereafter at the Des Plaines police station and that those statements should also have been suppressed. We decline to rule on whether the Schiller Park police brutality carried over to invalidate defendant's Des Plaines police station confession inasmuch as we agree with the defendant's further contention that he did not waive his right to counsel during the custodial interrogation at the Des Plaines station because the police did not tell him that his attorney was trying to reach him.

The Illinois supreme Court has held that the police have a duty to inform a defendant undergoing custodial interrogation of efforts by his attorney to consult with him and that the defendant's statements should have been suppressed if this is not done. (*People v. Smith* (1982), 93 Ill. 2d 179, 442 N.E. 2d 1325.) In *Smith*,

the defendant and an accomplice were arrested shortly before midnight. At 5:30 a.m. the next day, they met with a private attorney who agreed to represent them. Later that morning, they were advised by a judge of the charges against them. The defendant and his accomplice were then transported to another county jail.

At approximately 3 p.m. that same day, another attorney from the original attorney's law firm arrived at the jail where the defendant had been transported. The attorney was denied access to the defendant, because, the jailer told her, the defendant was going through heroin withdrawal. The attorney wrote on one of her business cards that she was the original attorney's partner and that the defendant should not make a statement without one of his lawyers present. Defendant was later interrogated and gave a statement without his attorney being notified.

Reversing this court's affirmance of the defendant's conviction and remanding the cause for a new trial, the Illinois supreme court held that pursuant to the fifth amendment protection against self-incrimination, the defendant's statements given during his interrogation should have been suppressed, based on the defendant's right to counsel during the custodial interrogation. (93 Ill. 2d 179, 185.) Citing the decision in *State v. Haynes* (1979), 268 Or. 59, 602 P. 272, *cert. denied* (1980), 446 U.S. 945, 64 L. Ed. 2d 802, 100 S.Ct. 2175, the court in *Smith* observed that in *Haynes*, the supreme court of Oregon reversed the defendant's conviction on the ground that the trial court should have suppressed the statements obtained after the police had successfully interfered with the attorney's attempt to consult with the defendant. In language applicable to the case before us, the *Haynes* court stated:

> "[W]e agree • • • that when law enforcement officers have failed to admit counsel to a person in custody *or to inform the person of the attorney's efforts to reach him*, they cannot thereafter rely on defendant's 'waiver' for the use of his subsequent uncounseled statements or resulting evidence against him. We believe this rule protects the suspect's right under [the State constitution] and the federal fifth and 14th amendments not to testify against himself." (Emphasis added.) 93 Ill. 2d 179, 187-88, citing 288 Or. 59, 72-74.

The Illinois supreme court in *Smith* held that when police, prior to or during custodial interrogation, refuse an attorney, appointed or retained, access to the suspect, "there can be no knowing waiver of the right to counsel *if the suspect has not been informed that his attorney was present and seeking to consult with him.* (Emphasis added.) (93 Ill. 2d 179, 189.) The court added that although the defendant in *Smith* had received the attorney's business card, without his being informed that the attorney had also requested to confer with him, the card and message were of little value. 93 Ill. 2d 179, 189.

In *Moran v. Burbine* (1986), —— U.S. ——, 89 L. Ed. 2d 410, 106 S. Ct. 1135, Cranston, Rhode Island police arrested Burbine in connection with a local breaking and entering offense. To obtain legal assistance for Burbine, his sister, Sheila Ray, called the public defender's office in search of Assistant Public Defender Richard Casparian, who was representing Burbine on other unrelated charges. Casparian was not in, but Casparian's associate, Assistant Public Defender Allegra Munson, received Ray's call. Ray told Munson about Burbine's arrest and requested the public defender's office to represent Burbine. Munson promptly telephoned the Cranston police station and asked that her call be transferred to the detective division. A man answered, "Detectives." After identifying herself, Munson inquired if Burbine was in custody and upon being advised that he was, Munson told the person that Assistant Public De-

fender Richard Casparian, who represented Burbine, was away from his office and unavailable, but that she would act as Burbine's attorney if the police intended to put Burbine in a lineup or question him. The unidentified male voice told Munson that neither activity was contemplated and that, "we're through with him for the night." Munson did not ask any further questions and did not leave any instructions before she hung up. The unidentified man did not tell Munson that at that very moment, three Providence police officers were at the Cranston station to question Burbine about the murder of Mary Jo Hickey in Providence three months earlier. Burbine was never told of his sister's efforts to obtain counsel for him or of Munson's telephone call to the police station.

Within an hour after Munson's telephone conversation with the Cranston police, the Providence police questioned Burbine about Hickey's murder. Burbine denied any involvement. The officers left him by himself in a small anteroom. Ten minutes later, Burbine summoned the detectives, saying he was "disgusted," "sorry" and wanted to confess. Burbine was informed of his *Miranda* rights and on three separate occasions he signed a written acknowledgement that he understood his *Miranda* rights and waived them. Burbine signed three confessions in which he admitted the murder.

The Supreme Court granted *certiorari* to decide "whether [Burbine's] confession [which was] preceded by an otherwise valid waiver must be suppressed either because the police misinformed an inquiring attorney about their plans concerning the suspect, or because they failed to inform the suspect of the attorney's efforts to reach him." The Court pointed out that although Burbine was fully admonished of his *Miranda* rights, he never requested counsel and that he waived his right to remain silent and to the presence of counsel. The Court stated, "Although highly inappropriate, even deliberate

deception of an attorney could not possibly affect a suspect's decision to waive his *Miranda* rights unless he were at least aware of the incident. * * *. Nor was the failure to inform respondent of the telephone call the kind of trickery that can vitiate the validity of a waiver." 106 S. Ct. 1135, 1142.

The Court further pointed out, "Nothing we say today disables the States from adopting different requirements for the conduct of its employees and officials as a matter of state law. We hold only that the Court of Appeals erred in construing the Fifth Amendment to the Federal Constitution to require the exclusion of respondent's three confessions." (106 S. Ct. 1135, 1145.) Thus, *Moran* does not overrule or disturb our supreme court's decision in *People v. Smith* (1982), 93 Ill. 2d 179, 442 N.E. 2d 1325.

Justice Stevens' dissenting opinion in *Moran*, joined by Justices Brennan and Marshall, pointed out that the majority opinion "completely rejects an entire body of law on the subject—the many carefully reasoned state decisions that have come to precisely the opposite conclusion." Justice Stevens thereupon cited 16 state court decisions,[2] including *Smith*, which held that a suspect's

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[2] *Elfadl v. Maryland* (1985), 61 Md. App. 132, 485 A. 2d 275; *Lodowski v. Maryland* (1985), 302 Md. 691, 490 A. 2d 1228, *petition for cert. filed*, 54 U.S.L.W. 3019 (U.S. June 21, 1985), (No. 85-23); *Dunn v. State* (Tex. 1985), 696 S.W. 2d 561, *cert. denied* (1986) —— U.S. ——, 89 L. Ed. 2d 732, 106 S. Ct. 1478; *Lewis v. State* (Okla. 1984), 695 P. 2d 528; *Commonwealth v. Sherman* (1983), 389 Mass. 287, 450 N.E. 2d 566; *Weber v. State* (Del. 1983), 457 A. 2d 674; *People v. Smith* (1982), 93 Ill. 2d 179, 442 N.E. 2d 1325; *State v. Matthews* (La. 1982), 408 So. 2d 1274; *State v. Haynes* (1979), 288 Or. 59, 602 P. 2d 272, *cert. denied*, (1980), 446 U.S. 945, 64 L. Ed. 2d 802, 100 S. Ct. 2175; *State v. Jones* (1978), 19 Wash. App. 850, 578 P. 2d 71; *Commonwealth v. Hilliard* (1977), 471 Pa. 318, 370 A. 2d 322; *State v. Jackson* (La. 1974), 303 So. 2d 734; *Commonwealth v. McKenna* (1969), 355 Mass. 313, 244 N.E. 2d 560; *Blanks v. State* (1985), 254 Ga. 420, 330 S.E. 2d 575; *State v. Beck* (Mo. 1985), 687 S.W. 2d 155; and *Haliburton v. Florida* (1985), 476 So. 2d 192.

statements given under circumstances similar to those in *Burbine* were obtained in violation of the suspect's constitutional privilege against self-incrimination and his attendant right of counsel and such statements therefore were inadmissible as evidence against him.

Finally, we note that the *Smith* decision cited *Miranda v. Arizona* (1966), 384 U.S. 436, 465-66, n. 35, 16 L. Ed. 2d 694, 86 S.Ct. 1602, as well as several decisions from other jurisdictions in which courts suppressed statements obtained from the defendant after the police had foiled an attorney's efforts to consult with his client. Those cited cases were: *State v. Matthews* (1982), 408 So. 2d 1274 (Louisiana), (because police refused to tell defendants their attorney was available and seeking to assist, subsequent interrogation was made without informed waiver or rights under the State constitution which incorporated the *Miranda* rights); *Commonwealth v. McKenna* (1969), 355 Mass. 313, 244 N.E. 2d 560, (suspect's waiver of right to counsel at an interrogation was ineffective where police denied counsel's request to see the defendant and failed to inform the defendant of the attorney's presence and request); *Commonwealth v. Hilliard* (1977), 471 Pa. 318, 370 A. 2d 322, (where the attorney was denied access to the suspect and the suspect was not told of the availability of the attorney, the suspect's failure to request counsel did not support a finding of waiver of counsel); and *State v. Jones* (1978), 19 Wash. App. 850, 578 P. 2d 61, (where the attorney requested that no interrogation be conducted in his absence and the police did not inform the defendant of the lawyer's availability and desire to be present, there was no knowing and intelligent waiver by defendant of his right to counsel.) 93 Ill. 2d 179, 188-89.

We reject the State's attempt in the case at bar to distinguish *Smith*. Although the defendant in *Smith* initially met with an attorney who agreed to represent him, the supreme court reasoned that the second attorney's thwarted efforts to talk to the defendant and the police officer's failure to tell the defendant that the second attorney had asked to see the defendant were reversible error and demanded a new trial.

In the pending case, defendant's attorney was not physically at the police station when he first made his request to talk to the defendant, but he testified at the pretrial hearing on the defendant's motion to suppress the defendant's statements that he asked to talk to the defendant when he spoke with Officer Meese on the telephone. Defendant's attorney told Meese that he was the defendant's attorney and that he had been asked by the defendant's wife to represent the defendant in this matter. As in *Smith*, this information was not communicated to the defendant.

We reject the State's reliance on *People v. Finklea* (1983), 119 Ill. App. 3d 448, 456 N.E. 2d 680. In *Finklea*, the court held that the defendant's statements were not elicited in violation of his fifth amendment right against self-incrimination when he was not informed during a police interrogation that an attorney retained to represent him was present and wished to see him because the defendant was not in custody during the interrogation. The court held that since the defendant was not in custody, *Miranda* did not apply. Such is not the case here.

With the preceding case analysis and authority as our guide, we are convinced that the State in this case failed to prove an effective waiver of counsel and that defendant's inculpatory statements should have been suppressed. Officer Meese acknowledged he had received a telephone call from defendant's attorney, Anthony Rocco, at about noon or 12:15. Rocco requested that he be notified of defendant's arrival at the station. Contrary to Meese's recollection, Rocco explained, "I then called the Des Plaines station and I spoke—approximately one o'clock,

I spoke to Investigator Meese, who—and I advised him that I was retained to represent Daniel Holland, and I requested to speak to him, himself. They told me that Holland had not come into the police station but that he was still in transit from Schiller Park."

In comparing his account with that of Officer Meese, Rocco stressed, "Now, I told Meese that I wanted him to call me, *that I did not want him to interrogate my client until I had a chance to see him and confer with him.* He said he understood it and that he would telephone me. * * *. I think, your Honor, it is reasonable to infer that I as an experienced criminal lawyer would not call an officer to have a lineup. I would know as a former Assistant State's Attorney who had taken many confessions myself, that they would attempt to interrogate him, and try to get him to admit to this crime, and that it would be obvious for me to tell them that I wanted to talk to him before they interrogated him."

Officer Meese's recollections on other points were shown to be mistaken. He testified defendant arrived at the Des Plaines station at about 2:30 or 2:45 but Assistant State's Attorney Raphaelson and Meese himself also testified to meeting with the defendant at 2 o'clock. Meese also stated that he spoke to defendant's attorney at about noon or 12:15, but defendant's wife testified she did not hire an attorney until 12:45 or 12:50. Thus, his failure to recall that defendant's attorney expressed the desire to see the defendant before the interrogation appears further error in recollection. The State has failed to show an adequate waiver of counsel by defendant at the custodial interrogation. It was error for the trial court to deny defendant's motion to suppress his statements. That ruling must be reversed.

Defendant's next contention for reversal is that his confession should not have been admitted because it was obtained by subterfuge and was therefore involuntary and inadmissible. We agree.

Assistant State's Attorneys Ira Raphaelson and Howie Friedman and Officer Meese were present during defendant's interrogation at the Des Plaines police station. Raphaelson testified at the hearing on defendant's motion to suppress his confession that the defendant gave "a false exculpatory statement" at that time and that after further conversation with the defendant, he and Friedman left the interview room. Meese remained in the room with the defendant. During this break in the interrogation, Meese continued talking to the defendant.

On cross-examination at the motion to suppress hearing, Meese testified:

> "Q And what did you say to Mr. Holland, and what did he say to you?
>
> A I continued questioning him relative to the crime. During my interview with the victim, she had indicated to me that while she was being forcibly raped in the alley, that a female had walked past the car. And I assumed that if Mr. Holland was involved, that he would have seen that same female. *At that time I indicated to him that we were notified by the City of Chicago that his vehicle was observed in the alley involved in a rape incident, and that he could not be identified, but that he would have to explain why the vehicle was there.* At that time he thought about that for approximately one to two minutes and voluntarily gave me a statement indicating—
>
> Q Was that a true statement he [you] made?
> A No, it was not.
> Q So you lied to him at that point?
> A I would not use the term, 'lie.'
> Q Pardon me?
> A *I would term it more subterfuge than lie.* (Emphasis added.)

Meese summoned Assistant Attorney Raphaelson back into the room and told Raphaelson that the defendant

would talk to him and now tell him what really happened. Defendant then gave a confession.

The State characterized Officer Meese's statement to the defendant as "basically true." The State argues that the only part of Meese's subterfuge that may have been misleading was that the city of Chicago had notified the Des Plaines police that an unidentified person saw the defendant's car in an alley when, in fact, the State points out, the complainant *had* seen the car in the alley and identified the defendant prior to the time that the defendant gave a confession.

We reject the State's effort to elevate Meese's misrepresentation to the defendant from what Meese himself characterized as a "subterfuge," to what the State refers to as a "basically true" statement. Whether a "subterfuge," misrepresentation, fabrication, falsehood or any other descriptive term to identify Meese's statement to the defendant, the statement was not true. The city of Chicago had *not* notified and had *not* told the Des Plaines police that defendant's car had been observed in the alley and that he could not be identified or that the defendant would have to explain why the car was there. In fact, by virtue of the defendant's fifth and fourteenth amendment privileges against self-incrimination, the defendant was not and could not have been required to explain why his car was anywhere at any time.

It is quite apparent that Meese made this statement to the defendant to frighten and induce him to confess. The "subterfuge" served its purpose. But a confession made under such circumstances is not freely and voluntarily given and is therefore inadmissible.

In determining whether a defendant's confession was voluntarily given, it must be ascertained whether the defendant's will was overborne at the time he confessed and whether the confession was made freely and without compulsion or inducement. As the Supreme Court unequivocally held in *Miranda v. Arizona* (1966), 384 U.S. 436, 476, 16 L. Ed. 2d 694, 86 S. Ct. 1602, "any evidence that the accused was threatened, tricked or cajoled into a waiver [of his fifth amendment privilege against self-incrimination] will, of course, show that the defendant did not voluntarily waive his privilege."

In *Lynumn v. Illinois* (1963), 372 U.S. 528, 9 L. Ed. 2d 922, 83 S. Ct. 917, the arresting officers misrepresented to the defendant, who had been arrested for the unlawful sale and possession of marijuana, that "if we took her into the station and charged her with the offense, that the ADC [Aid to Dependent Children] would probably be cut off and also that she would probably lose custody of her children." The confession as evidence vitiated the judgment of conviction because it violated the due process clause of the fourteenth amendment. The Court stated:

> "We think it clear that a confession made under such circumstances must be deemed not voluntary, but coerced. That is the teaching of our cases. We have said that the question in each case is whether the defendant's will was overborne at the time he confessed. [Citations.] If so, the confession cannot be deemed 'the product of a rational intellect and a free will.'" 372 U.S. 528, 534.

In *Lynumn*, the Supreme Court construed the officer's misrepresentation to the defendant as threats. In the case before us, Meese's misrepresentation to the defendant can likewise be so construed. Meese did not tell the defendant what would happen if the defendant failed to explain why his car was at the scene of the rape offense. Meese left that to the intimidated imagination of the defendant. Meese's misrepresentation was not only a "subterfuge," it was also a threat, as were the misrepresentations in *Lynumn*.

In *People v. Lee* (1984), 128 Ill. App. 3d 774, 471 N.E. 2d 567, the defendant was convicted of raping the

complainant in her apartment. The complainant testified that the defendant was her co-employee and a social acquaintance who had previously visited her home. When the defendant was initially taken into custody he denied being in the complainant's apartment on the night of the alleged rape. The assistant State's Attorney accurately told the defendant that he had been identified as the rapist but misrepresented to the defendant that his fingerprints had been found in the complainant's apartment. The defendant then admitted that he had been in the apartment on the night that the complainant said she had been raped.

The defendant in *Lee* stated that he and the complainant were co-workers and had an ongoing sexual relationship. He admitted that on the night in question, he and the complainant embraced, went into the bedroom and undressed, that they argued and that the defendant verbally abused and treated the complainant roughly. When the complainant mentioned the name of her former lover, the defendant left the apartment when the complainant ordered him to do so. The defendant denied the rape.

Citing *Miranda v. Arizona* (1966), 384 436, 16 L. Ed. 2d 694, 86 S. Ct. 1062; *People v. Stevens* (1957), 11 Ill. 2d 21, 141 N.E. 2d 33; and *People v. Gunn* (1973), 15 Ill. App. 3d 1050, 305 N.E. 2d 598, this court held in *Lee* that the assistant State's Attorney's misrepresentations to the defendant that his fingerprints had been found in the complainant's apartment rendered the defendant's confession involuntary and inadmissible, necessitating reversal of the rape conviction. 128 Ill. App. 3d 774, 780; see also *Spano v. New York* (1959), 360 U.S. 315, 3 L. Ed. 2d 1265, 79 S.Ct. 1202, where a misrepresentation to the defendant that his police friend's job would be jeopardized if the defendant did not confess was one of the factors on which the Supreme Court relied in holding that the defendant's confession was involuntary.

We hold that because Officer Meese made a knowing misrepresentation to the defendant, the defendant's confession was improperly obtained by subterfuge, was involuntary, not freely given and was inadmissible. The trial court erred in denying the defendant's motion to suppress his confession.

Defendant also urges that his conviction for armed robbery should be reversed because, he contends, the evidence failed to establish that he obtained the complainant's property with force, an element necessary for an armed robbery conviction. According to defendant, although he warned the victim that he would "knock her out," that threat had no bearing on his obtaining the victim's property. Instead, defendant maintains, the force he exerted was used in committing the sexual offenses and not to obtain the victim's property. We disagree.

Armed robbery is defined as the taking of property from the person or presence of another by the use of force or by threatening the imminent use of force while armed with a dangerous weapon. (Ill. Rev. Stat. 1981, ch. 38, par. 18-2; *People v. Ditto* (1981), 98 Ill.App. 3d 36, 424 N.E. 2d 3.) In an armed robbery offense, the requirement that the force be used to take property from another is satisfied if the fear of the victim was of such nature as in reason and common experience is likely to induce a person to part with his property. *People v. Dates* (1981), 100 Ill. App. 3d 365, 426 N.E. 2d 1033.

In the pending case, immediately before the defendant took the complainant's property, the defendant threatened the complainant with imminent force. Defendant stated to the complainant, while armed with a knife, that he was going to knock the complainant unconscious. The complainant was afraid and parted with her property because of these threats and her fear. The complainant's fear for her physical safety, which was reason-

ably based on the defendant's continuing threat of the imminent use of force to do bodily harm to her, was sufficient to induce her to part with her property—her driver's license, money and high school identification card.

Also, after the final sexual assault, defendant still brandished a knife. The evidence clearly established that the complainant was threatened by the defendant with the imminent use of force and that the defendant, while armed with a dangerous weapon, acquired the complainant's property.

Our disposition of this issue is persuaded by *People v. Pavic* (1982), 104 Ill. App. 3d 436, 432 N.E. 2d 1074. In *Pavic*, after illegally entering the victim's apartment and hiding in a bedroom closet, the defendant grabbed the victim's throat, choked her, and told her to stop screaming or he would stab her. The defendant also demanded money, which the victim said was in her purse. The defendant raped the victim twice. Thereafter, he went into the living room and took the victim's money and record albums.

The defendant argued that his conviction for robbery should be reversed because the force involved in the rape could not be imputed to the taking of the victim's property. The court's reasoning in *Pavic* is relevant to the determination we must make in the instant case. The court stated:

> "Here, it has been proved beyond a reasonable doubt that defendant exerted brutal force against G.S. when he grabbed her and chocked her and raped her. It cannot seriously be contended that the victim was not subdued by defendant's actions.
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> • • • •
>
> [T]he present case involves evidence that defendant demanded money from G.S. at the beginning of the attack. The jury could well have inferred that

> he intended to rob her all along. After choking and raping her, moreover, defendant hardly had reason to anticipate any further resistance; his force against her remained in effect. Therefore, we hold that since defendant's use of force was not limited to the sexual assault and thus satisfies the robbery statute, defendant's robbery conviction must be affirmed." 104 Ill. App. 3d 436, 445-46.

In the case before us, defendant's reliance on *People v. King* (1979), 67 Ill. App. 3d 754, 384 N.E. 2d 1013, which affirmed the defendant's rape conviction but reduced the defendant's robbery conviction to theft, is misplaced. As the court pointed out in *King*:

> "[T]he evidence revealed that the rape occurred in the bedroom and that the purse was taken from the kitchen. The testimony established the distance between these two points was approximately 15 to 30 feet. *Nowhere in the record is there any indication that the purse was taken from the presence of the victim* with the use of force as required by the robbery statute." (Emphasis added.) 67 Ill. App. 3d 754, 759.

The defendant's reliance on *People v. Pack* (1976), 34 Ill. App. 3d 894, 341 N.E. 2d 4, which affirmed the defendant's attempted murder conviction but vacated his robbery conviction, is likewise misplaced. As the court in *Pack* stated:

> "Defendant looked through a window of the victim's house and saw her asleep. He then entered the house, choked her until he thought she was dead, took money from her purse, lying on a nearby chair, and fled. We believe that, although the facts adequately supported the attempt conviction, no factual basis was established to support the robbery charge. *Force was used against the victim with the intent to kill, not to steal. The subsequent taking of prop-*

erty, apparently an afterthought, established only theft * * *." (Emphasis added.) 34 Ill. App. 3d 894, 899.

In the case at bar, the force defendant used against the complainant in committing the sexual offenses and the complainant's fear occasioned thereby were in effect and present when the defendant took her property. The jury therefore had sufficient evidence to find beyond a reasonable doubt that the defendant committed the armed robbery offense.

Defendant's remaining issues are: (1) the extended term sentences for aggravated kidnapping was erroneous and should be "replaced" because it was not the most serious offense for which defendant was convicted; (2) the consecutive sentence for armed robbery was improper and should be vacated or made concurrent because the offense was part of a single course of conduct; and (3) the order that the sentences "shall be served consecutive to any parole violations" is too broad and indefinite to be valid.

The applicable section of the extended term statute provides:

> "A judge shall not sentence an offender to a term of imprisonment in excess of the maximum sentence authorized by Section 5-8-1 for the class of the most serious offense of which the offender was convicted unless the factors in aggravation set forth in paragraph (b) of Section 5-5-3.2 were found to be present." Ill. Rev. Stat. 1981, ch. 38, par. 1005-8-2(a).

Section 5-5-3.2(b) states:

> "[T]he following factors may be considered by the court as reasons to impose an extended term sentence under Section 5-8-2 upon any offender who was at least 17 years old on the date the crime was committed:

> (1) When a defendant is convicted of any felony, after having been previously convicted in Illinois of the same or greater class felony, within 10 years, excluding time spent in custody, and such charges are separately brought and tried and arise out of different series of acts; or
>
> (2) When a defendant is convicted of any felony and the court finds that the offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty; or
>
> (3) When a defendant is convicted of any felony committed against:
>
> (i) a person under 12 years of age at the time of the offense;
>
> (ii) a person 60 years of age or older at the time of the offense; or
>
> (iii) a person physically handicapped at the time of the offense." Ill. Rev. Stat. 1981, ch. 38, para. 1005-5-3.2(b).

In the case before us, the trial court stated in sentencing the defendant:

> "[I]n imposing sentence, I've considered not only the evidence I have referred to and I've considered, but in particular that on this particular occasion, on May 4, 1980, the defendant, with a knife, kidnapped [the complainant] from the street. She sought his assistance with her friend because their automobile had broken down. He took them in his car and he held out a hand. They thought he was, in fact, an off-duty police officer. That's what he extended himself to be.
>
> * * * *

He [defendant] terrorized the complaining witness by threatening to kill her and members of her family if she should, in fact, go to the police.

And I, therefore, find that mental anguish and a strong possibility of impending death was upon the complaining witness throughout these entire proceedings; during the time she was with the defendant for one-and-a-half hours.

And therefore, this Court finds that the offenses of rape, deviate sexual assault and aggravated kidnapping were accompanied by exceptionally brutal and heinous behavior, indicative of wanton cruelty."

Thus, the trial judge held that the defendant's threat to kill the complainant and members of her family created "mental anguish and a strong possibility of impending death" and was exceptionally brutal and heinous behavior indicative of wanton cruelty. We do not decide whether a defendant's threat to kill a victim constitutes exceptionally brutal and heinous behavior indicative of wanton cruelty.

The defendant further contends that the trial court erred in sentencing him to a consecutive term of imprisonment for armed robbery. Ill. Rev. Stat. 1981, ch. 38, par. 1005-8-4(a) provides:

"When multiple sentences of imprisonment are imposed on a defendant at the same time * * * the sentences shall run concurrently or consecutively as determined by the court. The court shall not impose consecutive sentences for offenses which were committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective, unless, one of the offenses for which defendant was convicted was a Class X or Class 1 felony and the defendant inflicted severe bodily injury, in which event the court may enter

sentences to run consecutively. Sentences shall run concurrently unless otherwise specified by the court."

The trial court expressly found:

"The armed robbery took place in the City of Chicago after the rapes had been completed. This was, in fact, a substantial change in the nature of the defendant's original objectives, and for that reason I made those express findings. *The armed robbery was not—again, was not a part of the defendant's original objective. His original objective was for sexual gratification and the armed robbery was not.* Therefore, the armed robbery was a distinctive objective and a distinctive offense." (Emphasis added.)

Other than as above noted, the trial court neglected to specify on what evidence it based its finding that "the defendant's original objective was for sexual gratification and the armed robbery was not," or that the initial purpose of the kidnapping was for sexual gratification.

Although the evidence clearly established that the sexual offenses were the initial offenses committed, the evidence did not establish that those sex offenses were the defendant's exclusive purpose of kidnapping the complainant.

Finally, the defendant contends that the order that "All of these sentences shall be served consecutive to any parole violations" is too indefinite and ambiguous and is therefore invalid. The defendant relies on what he characterizes as the "erroneous order" in *People v. George* (1979), 75 Ill. App. 3d 140, 393 N.E. 2d 1182, where the court imposed a sentence of 364 days "to run consecutive with any now pending sentence or any such further sentence received by virtue of a parole violation."

The State in *George* conceded that the sentence was improper under *People v. Walton* (1969), 118 Ill. App.

2d 324, 254 N.E. 2d 190, and agreed that the cause should be remanded for resentencing. The court in *Walton* stated:

> "Such language is so broad that it may be said to make this sentence consecutive to other sentences not in the present record. A sentence should be so complete as not to require construction by the court to ascertain its import, and so complete that it will not be necessary for a nonjudicial or ministerial officer to supplement the written words to ascertain its meaning." 75 Ill. App. 3d 140, 144, citing 118 Ill. App. 2d 324, 333.

Our supreme court held in *People v. Toomer* (1958), 14 Ill. 2d 385, 152 N.E. 2d 845, which was also cited in *George*, that:

> "[A] sentence of imprisonment to take effect in the future as cumulative punishment upon the termination of another sentence must be of such certainty that the commencement of the second and the termination of the first sentence may be ascertained from the record." 75 Ill. App. 3d 140, 144, citing 14 Ill. 2d 385, 387.

In the case before us, the State urges that the trial court's sentence is valid under *People v. Starnes* (1980), 88 Ill. App. 3d 1141, 411 N.E. 2d 125, where the trial court stated in imposing sentence:

> "Now, this is to be served consecutively to any prior convictions from this Court in 75-CF-231, and 76-CF-26. If your parole has run out you will just have to serve the three years with a day off for every day served for good behavior. If it has not run out then they will add that on."

The court in *Starnes* relied on *People v. Ferguson* (1951), 410 Ill. 87, 91, 101 N.E. 2d 522, *cert. denied*

(1952), 343 U.S. 910, 96 L. Ed. 2d 1327, 72 S. Ct. 643, which held that the validity of a judgment is not conditioned upon the choice of the most felicitous mode of expression.

Because we reverse the defendant's convictions and remand for a new trial, we do not decide the validity of the sentences imposed or whether defendant was denied effective assistance of counsel. The remaining issues raised by defendant do not merit discussion.

Reversed and remanded

Murray *, J., concurs.

Sullivan, P.J., dissents.

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* Justice Mejda heard the oral argument in this case and following his retirement, Justice Murray was substituted, listened to the tapes of the oral argument and read the briefs and record.

JUSTICE SULLIVAN DISSENTING:

The majority opinion reverses on conclusions that defendant's confession should have been suppressed (a) because he did not waive his right to counsel during the custodial interrogation when the confession was obtained and (b) because the confession was improperly obtained through a subterfuge by Officer Meese. I disagree with both conclusions.

The majority first concludes that there was no waiver of defendant's right to counsel "because the police did not tell him that his attorney was trying to reach him." In reaching this conclusion the majority opinion relies entirely on "testimony" of defense attorney Rocco that he told Officer Meese that he wanted to speak to defendant. However, Rocco gave no such testimony.

At the hearing on the motion to suppress, assistant State's Attorney Raphaelson, who was an assistant U.S. Attorney at the time of trial, testified that he did not talk to Attorney Rocco until 3 p.m. on May 4, which was after defendant's confession, and that prior thereto Raphaelson did not know that any attorney was trying or had attempted to reach defendant. Officer Meese testified that Attorney Rocco telephoned between noon and 12:15 p.m. on May 4 and requested only that he be notified when defendant was transferred to the DesPlaines Station for a lineup and that he (Meese) called Rocco between 2:30 and 2:45 p.m. that day to inform him of the lineup but Rocco was not at home. Meese also testified that he was not told by Rocco or anyone else that Rocco wanted to speak to defendant. At the hearing, Rocco testified that he came to the DesPlaines Station at 3:45 p.m. on May 4, which was after the confession and that he was permitted to see defendant at that time. Rocco gave no testimony, as stated in the majority opinion, that he told Meese or anybody else at any time before the confession was given that he wanted to speak to defendant. In fact, no one gave any testimony at the hearing contradicting that of Raphaelson and Meese as set forth above.

The record does show that in his interrogation of Meese during the hearing to suppress the confession Rocco asked whether he (Rocco) told him in the telephone conversation on May 4 that he wanted to speak to defendant but Rocco did not testify to any such statement. The majority considered this questioning and a comment made by Rocco in his argument as testimony by him in reaching the conclusion that there was no waiver of counsel by defendant because his counsel was not permitted to speak with him. The conclusion is unsupportable.

The conclusion is also improper under *Moran v. Burbine* (1986), —— U.S. ——, —— L.Ed.2d ——, 106 S.Ct. 1135, where the Supreme Court held that so long as defendant himself validly waived his right to counsel his statement to the police was admissible even though they would not allow an attorney hired by defendant's sister to contact him. After his initial arrest for breaking and entering, Burbine was informed of his *Miranda* rights but he refused to sign a waiver of counsel at that time. The police did not again question him for almost five hours, during which period others who had been arrested with Burbine implicated him in a murder. Within that five-hour interval a lawyer from the office of the public defender, in response to a call from defendant's sister, informed the police by telephone that he would act as Burbine's attorney if he were questioned or was included in a lineup. The police did not inform Burbine of the call and subsequently, after *Miranda* warnings, undertook three separate interrogations of him, after each of which he signed waivers of his rights and gave written statements which were used at the murder trial.

It was held in *Burbine* that the conduct of the police in thwarting the efforts of counsel to contact him did not undermine the validity of the otherwise proper waiver of his right to counsel. The court stated, in pertinent part, that such deception "could not possibly affect a suspect's decision to waive his *Miranda* rights unless he were at least aware of the incident." —— U.S. ——, ——, —— L.Ed.2d ——, ——, 106 S.Ct. 1135, 1142.

The majority here, while agreeing that under *Burbine* there would be a valid waiver in the instant case, relies instead upon *People v. Smith* (1982), 93 Ill.2d 179, 442 N.E.2d 1325, in finding that there was not a waiver. In *Smith*, following defendant's arrest he met with a private attorney who agreed to represent him and later the same day the attorney's associate went to the jail where defendant was detained but was denied access to him. The court held that there could be no knowing waiver of the right to counsel "if the suspect has not been informed that the attorney was present and seeking to consult with him." 93 Ill.2d 179, 189

I view *Smith* as being inapplicable because (a) at the time of his confession defendant here had not retained an attorney and did not know that his sister had contacted Rocco; (b) no attorney had presented himself or herself at any place where defendant was detained and (c) there is no testimony in the record that any attorney had ever sought to speak or consult with defendant prior to his confession. See *People v. Owens* (1984), 102 Ill.2d 88, 100, 464 N.E.2d 261 and *People v. Martin* (1984), 102 Ill.2d 412, 424, 466 N.E.2d 228 (*Smith* inapplicable where there was no indication in the record that any attorney attempted to confer with defendant prior to his confession).

I disagree also with the majority's other conclusion in reversing that the court erred in denying the motion to suppress defendant's confession because "Officer Meese

made a knowing misrepresentation to defendant, the defendant's confession which was improperly obtained by subterfuge, was involuntary, not freely given and was inadmissible." As stated in the majority opinion, Meese admitted at the hearing on the motion to suppress that he made an untrue statement to defendant that the police had been notified by the city of Chicago that his car had been seen in the alley where the crimes occurred and that, while he could not be identified, he would have to explain why his car was there. Solely on the basis of this statement by Meese the majority finds that defendant's confession was not freely and voluntarily given.

It is difficult to understand how the majority makes this finding since (a) defendant in his testimony made no mention of any statement by Meese that his car was seen in the alley where the crimes occurred; (b) defendant did not testify that any such statement by Meese or any other statement by anyone induced, coerced or influenced him in any manner to give his confession; (c) the confession was not given to Meese but to the two assistant State's Attorneys, Raphaelson and Freedman, and there is nothing in the record which even remotely suggests that either said or did anything to influence the confession and (d) defendant's counsel did not contend at any time in the trial court that Meese's statement coerced or influenced in any manner defendant's confession.

In fact, the record discloses that the only question asked of defendant at the hearing on the motion to suppress concerning the reason he gave the confession was by his attorney as follows: "Now did you confess once you were—because you were hurt?" and defendant answered "Yes I wanted people to leave me alone." Moreover, it is noted that the trial court found, in denying the motion to suppress the confession of defendant, that "his will was not overborne and he acted without any compulsion or any inducement of any sort whatsoever,

and he received his rights, and he acted freely and voluntarily and intelligently when he made the statements • • •."

Under these circumstances, where its conclusion is based solely upon the statement made by Meese to defendant and neither defendant nor his attorney stated or gave any indication in the trial court that the statement in any way influenced his confession, the finding of the majority that the confession was not freely or voluntarily given because of Meese's statement is unjustified.

For the reasons stated, I find that there is no support in the record here for the conclusions of the majority in reversing the convictions.

SUPREME COURT OF ILLINOIS

Docket No. 64182

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellee,

vs.

DANIEL HOLLAND,
Appellant

Filed December 21, 1987

JUSTICE MORAN delivered the opinion of the court:

Defendant, Laniel Holland, was charged by indictment with two counts of aggravated kidnaping (Ill. Rev. Stat. 1979, ch. 38, para. 10—2(a)(3), (a)(5)); two counts of rape (Ill. Rev. Stat. 1979, ch. 38, par. 11—1); two counts of deviate sexual assault (Ill. Rev. Stat. 1979, ch. 38, par. 11—3); one count of armed robbery (Ill. Rev. Stat. 1979, ch. 38, par. 18—2); and one count of aggravated battery (Ill. Rev. Stat. 1979, ch. 38, par. 12—4(b)(1)). These charges stemmed from the sexual assault of a female suburban Cook County teenager. The indictment also charged the defendant with two counts of aggravated battery as a result of a confrontation with two police officers after his arrest (Ill. Rev. Stat. 1979, ch. 38, par. 12—4(b)(6)) and one count of unlawful use of weapons within five years of release from a penitentiary (Ill. Rev. Stat. 1979, ch. 38, para. 24—1(a)(9), (b)). On defendant's motion, the court severed the counts charging aggravated battery of a police officer and the count charging unlawful use of weapons. Trial

proceeded before a jury in the circuit court of Cook County on the remaining counts of the indictment.

Defendant was found not guilty of aggravated battery but was found guilty of aggravated kidnaping, rape, deviate sexual assault, and armed robbery. The court entered judgment on the verdicts and held a sentencing hearing to consider factors in aggravation and mitigation. At the conclusion of the hearing, the court found "that the offenses of rape, deviate sexual assault and aggravated kidnapping were 'accompanied by exceptionally brutal [or] heinous behavior indicative of wanton cruelty.'" (Ill. Rev. Stat. 1979, ch. 38, par. 1005—5—3.2(b)(2).) The court then sentenced the defendant to extended terms of 60 years' imprisonment for rape and deviate sexual assault (Ill. Rev. Stat. 1979, ch. 38, par. 1005—8—2(a)(2)) and an extended term of 30 years' imprisonment for aggravated kidnaping (Ill. Rev. Stat. 1979, ch. 38, par. 1005—8—2(a)(3)). These sentences were to run concurrently. As to the conviction for armed robbery, the court made a "separate and distinct" finding that the defendant's objectives changed during the course of the kidnapping from sexual gratification to armed robbery and that the sexual assault was completed before the armed robbery occurred. The court further found that this conviction was the defendant's fifth conviction for armed robbery and that society required protection from the defendant. On the basis of these findings, the court imposed a term of 25 years' imprisonment for armed robbery and ordered that it be served consecutively to the extended term sentences already imposed. (Ill. Rev. Stat. 1979, ch. 38, pars. 1005—8—4(a), (b).) The court further ordered that "[a]ll of these sentences shall be served consecutive to any parole violations."

Defendant appealed, raising numerous errors but principally contending that an inculpatory statement made during his post-arrest interrogation by an assistant

State's Attorney violated his *Miranda* rights (*Miranda v. Arizona* (1966), 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602) and should have been suppressed. A divided appellate court agreed, concluding that defendant's waiver of his *Miranda* rights was invalid because he was not informed, prior to receiving his rights and giving an inculpatory statement, that an attorney was attempting to see him. The majority of the court also held that defendant's statement was inadmissible because it was the product of a police "subterfuge." (147 Ill. App. 3d 323, 337-38.) We granted the State's petition for leave to appeal pursuant to Supreme Court Rule 604(a) (103 Ill. 2d R. 604(a)).

The central issue presented is the validity of defendant's waiver of his *Miranda* rights. We also consider the following issues raised by the defendant: (1) that the State used its peremptory challenges to exclude black jurors in violation of *Batson v. Kentucky* (1986), 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712; (2) that his trial counsel was ineffective; (3) that his conviction for armed robbery was improper because the State failed to prove that he took the complainant's property by force or threat of force; (4) that imposition of extended term sentence for aggravated kidnaping was improper; and (5) that imposition of consecutive sentences was improper. We first summarize the facts pertinent to these issues.

Testimony presented at the hearing on defendant's motion to suppress various post-arrest incriminating statements established that the defendant was the object of a traffic stop at approximately 8 a.m. on May 4, 1981, by a Schiller Park police officer because the vehicle he was driving did not have a rear license plate. The officer ordered a check of defendant's driver's license and found that it had been revoked. While awaiting the results of the driver's license check, the officer noticed that defendant's vehicle—a dark blue Chevrolet Camaro, his clothing—blue jeans, a jean jacket, a while T-shirt bearing

the word "Superscrew," and his physical appearance matched information contained in a reported abduction which occurred in Des Plaines, Illinois, at approximately 6 a.m. on May 4, 1980.

Defendant was arrested for improper vehicle registration, driving on a revoked license, and illegal transportation of alcohol. At the time of his arrest, a straight blade hunting knife was removed from his back pocket. Defendant was transported to the Schiller Park police station and, in a subsequent search, the complainant's high school identification card was found in a pocket of defendant's jacket. Also found in this search was $58.80 in currency and coins.

Schiller Park police then contacted Detective John Meese of the Des Plaines police regarding the arrest of the defendant. Detective Meese asked that the defendant be photographed and held pending further investigation. Detective Meese obtained the defendants' photograph from the Schiller Park police and presented it along with six others to the complainant. After she identified the defendant's picture as representing her assailant, Meese made arrangements to transport the defendant to the Des Plaines station. Prior to moving the defendant, Meese spoke by telephone to Anthony Rocco, who represented himself as defendant's attorney. According to Meese, Rocco asked to be notified if the defendant was to be placed in a lineup. Meese testified that he telephoned Rocco later that afternoon and left a message that the defendant would be in a lineup.

Meese transported the defendant to the Des Plaines station. Upon arriving, Meese advised him of his *Miranda* rights and was present during an interview conducted by Assistant State's Attorney Ira Raphaelson, accompanied by Assistant State's Attorney Howard Freedman. The interview began at approximately 2:05 p.m. on the afternoon of May 4.

Meese heard Raphaelson give the defendant his *Miranda* rights. About 20 minutes later, Raphaelson left the interview room, leaving the defendant and Detective Meese alone together. At this time, Meese told the defendant:

> "that we had received a report from the City of Chicago in reference to a female being raped in an alley. At that time his license plate was given as to the offending vehicle, and his vehicle was described as the same type vehicle.
>
> At that time I told him that the woman could not make a positive identification of him; however, he would have to explain why his vehicle was at that particular location."

Meese also testified that, in fact, he had not received such a report. However, Meese stated that the defendant responded by saying "he now wished to tell the truth."

Meese summoned Raphaelson and remained in the room during this second interview. He testified that he again heard Raphaelson advise defendant of his *Miranda* rights. During this interview, the defendant gave an oral inculpatory statement in which he admitted that he had picked up the complainant and her companion on Irving Park Road in Des Plaines; that he forced the companion from his car; that he forced the complainant to accompany him; that he forced her to perform two acts of fellatio and also raped her on two separate occasions. In addition, he admitted taking the complainant's money and her high school identification.

Meese stated that the defendant did not complain of any injuries when he arrived at the Des Plaines police station. He stated that he observed no physical or mental coercion of the defendant during the two interviews conducted by Raphaelson. Meese also indicated that the defendant acknowledged that he understood his *Miranda* rights and at no time requested an attorney.

Assistant State's Attorney Ira Raphaelson testified at the suppression hearing that he interviewed the defendant twice on May 4—once at approximately 2:05 p.m. and a second time at approximately 2:30 p.m. Raphaelson stated that he began the first interview by introducing himself and telling the defendant that he represented the State and not the defendant. He then advised the defendant of his *Miranda* rights. According to Raphaelson, defendant indicated that he understood his rights and agreed to talk. Defendant proceeded to give a false exculpatory statement in which he said that he had picked up a teenage girl and her boyfriend who were hitchhiking and that an argument ensued whereupon he ordered the two out of his car. The defendant explained his possession of the complainant's school identification card by saying that she had dropped it on the floor of his car, where he found it and placed it in the pocket of his jacket.

Raphaelson stated that he left the interview room. The defendant and Detective Meese remained inside with the door slightly open. Raphaelson stood about 10 feet from the door. He could not see the defendant, but he could see Meese, who was talking, presumably to the defendant. At approximately 2:30 p.m., Meese called him back into the interview room. Raphaelson reentered and again advised the defendant of his *Miranda* rights. Defendant again indicated that he understood his rights. He proceeded to give his oral incriminating statement.

Raphaelson testified that he then left the room and spoke to defendant's attorney, Anthony Rocco. According to Raphaelson, Rocco wanted to know what charges would be filed but did not ask to be present during any interviews or interrogations. Raphaelson also stated that, while he was aware that defendant's attorney had called the Des Plaines station, he was unaware of any request to speak with the defendant prior to any interviews. At

approximately 4 p.m. on May 4, Raphaelson informed Rocco of the charges against the defendant.

Defendant's wife, Patricia Holland, also testified at the suppression hearing. She stated that a Schiller Park officer notified her around 8:30 a.m. on the morning of May 4, 1980, that her husband had been arrested for several traffic violations and that she should come to the station to post bond. Later that morning, she was informed that her husband was being held for the Des Plaines police, who were preparing other charges against him. Mrs. Holland was not told what charges were contemplated.

Mrs. Holland then contacted Anthony Rocco and requested that he represent her husband. She reached Rocco around 1 p.m. on May 4. During that afternoon, she spoke to him on several occasions. During each conversation, Rocco related his unsuccessful efforts to see the defendant. Mrs. Holland further testified that she met attorney Rocco at the Des Plaines station around 3:45 p.m. Shortly thereafter, Rocco was permitted to meet with the defendant.

The defendant testified at the suppression hearing, stating that he spoke to his wife by telephone around 8:30 a.m. on May 4, 1980. He was in the custody of the Schiller Park police. He stated that he told his wife to contact attorney Rocco so that he could arrange for the defendant's release.

Defendant further testified that, while in the custody of the Schiller Park police, an officer pulled his hair. As he resisted, defendant stated, his hands were handcuffed behind him and his "arms were elevated to where [he] couldn't stand on [his] feet. [He] was knocked to the ground, kicked, hit." The defendant also stated that he was punched with a 40-inch night stick "where I would be covered with clothing." As a result, defendant stated that he lost tufts of hair, that his ribs hurt, and that his

right knee became swollen. He testified that he was hit repeatedly under his chin with a billy club while his "mug shot" was taken. When he resisted, he was knocked to the floor and beaten again. Defendent received no medical treatment while at the Schiller Park station.

Defendant further testified that he was mistreated by Detective Meese of the Des Plaines police after he arrived at the Des Plaines station. According to the defendant, between the first and second interview with Assistant State's Attorney Raphaelson, he was left alone with Meese. During this time, Meese jabbed him in the ribs for about 5 to 10 minutes. Meese then said that the defendant "better start answering questions or he was going to kick my ass." Shortly thereafter, Raphaelson returned. However, defendant did not tell Raphaelson about Meese's physical mistreatment or about his verbal threat. According to the defendant, he then told them "what [he] believed [they] wanted to hear." There followed an incriminating statement in which defendant admitted that he had picked up the complainant and her boyfriend; that he forced the boyfriend out of the car; that he forced the complainant to perform two acts of fellatio; that he raped her. Defendant stated that, throughout this entire period, no one advised him of his *Miranda* rights.

Defendant also testified that, after his arrival at the Des Plaines station, he repeatedly asked for an attorney. Ultimately, he did see his attorney, Anthony Rocco, but not until he had given his inculpatory statement and had been placed in a lineup. When he did see his attorney, defendant told him of the physical mistreatment he had received. On May 5, defendant stated that he was taken to Cermak Hospital, where he was told that he probably had fractured ribs in the mid-chest area. Defendant was given medication for pain and told to take sitz baths for his knee.

Anthony Rocco, defendant's attorney, also testified at the suppression hearing. He testified that he first saw the defendant at 4 p.m. on May 4 and that he was limping. Rocco stated that the defendant said that he had been beaten and showed Rocco his right knee. According to Rocco, the knee was discolored. Rocco also stated that the defendant said that he had been mistreated by the Schiller Park police and by Detective Meese of the Des Plaines police.

Attorney Rocco did not testify regarding his various attempts to reach the defendant and talk to him prior to any questioning. However, during his closing argument on the motion to suppress, Rocco stated that he talked to Detective Meese by telephone around 1 p.m. on May 4 and specifically requested to talk to the defendant prior to any questioning. Rocco also argued that, sometime between 1 and 3 p.m., he made this same request of Assistant State's Attorney Raphaelson. Rocco concluded his argument by noting that he was not permitted to see the defendant until after he had given an incriminating statement and had been placed in a lineup.

At the close of testimony on defendant's motion to suppress, the court concluded "that [the] degree of physical confrontation contaminate[d] any statements defendant would have made at the Schiller Park Police Station, and accordingly any statements made relevant to this cause made by the defendant in the Schiller Park Police Station * * * are hereby suppressed, and suppressed in toto." The court also found that the defendant was given his *Miranda* rights by Assistant State's Attorney Raphaelson and further found that "no physical cruelty was proved to be exerted by the police department in Des Plaines." The court concluded that defendant's "will was not overborne, and he acted without any compulsion or inducement of any sort whatsoever, and he received his rights, and he acted freely and voluntarily and intelligently when he made the statements of 2:05 and 2:30."

The case against the defendant proceeded to trial. During opening arguments, the State made no mention of defendant's incriminating statement in reviewing what it expected to prove and by what evidence. However, defense counsel Rocco did refer to defendant's inculpatory statement during his opening argument.

The State's principal witness was the complainant. She testified that she and her boyfriend left a party they were attending around midnight on May 4, 1980. A short while later, they discovered that their car had a flat tire. After pulling off onto the shoulder of Irving Park Road in Des Plaines, they found that the spare tire was flat as well. They turned on the car's emergency flashing lights, but no one stopped to give assistance. After about an hour, they decided to sleep in the car and go for help in the morning. They turned off the flashing lights, turned on the parking lights, and went to sleep.

The two awoke at dawn, approximately 6 a.m., on May 4 and began walking down Irving Park Road. Almost immediately, the defendant drove up in a blue Chevrolet Camaro and offered to give them a ride. They accepted and got into defendant's car. The complainant sat in the front passenger seat while her companion sat in the back seat. After driving around awhile, the defendant grabbed the complainant around her shoulder, placed a knife to her throat, and ordered her companion out of the car. When he refused to exit, the defendant said that he would kill the complainant unless he complied. He acquiesced and the defendant drove off with the complainant.

The complainant continued, testifying that the defendant held the knife under her arm while he drove. Defendant proceeded to the parking lot of an apartment complex where he ordered her to disrobe. After undressing, she testified that the defendant pushed her head into his groin area, where his penis entered her mouth. Defendant then stated, "you're not getting it hard," whereupon he cut her on the right leg from the upper thigh to the hip.

She stated that the defendant began driving again while his penis remained in her mouth. The defendant drove to an alley on Diversey in Chicago and parked. She said that a woman saw them drive into the alley. The defendant stopped the car and forced her to straddle him and the defendant's penis entered her vagina. Defendant then ordered her out of the car and forced her to perform a second act of fellatio. Next, he told her to turn around and face the car, at which time she again felt his penis enter her vagina.

Defendant returned her clothes and told her to get dressed. He then told her to close her eyes and, when she asked why, he said, "it'll be easier that way. I'm going to knock you out." The complainant testified that she told him he could have anything he wanted, giving him her high school identification card while the defendant took her money, approximately $60. She concluded her testimony by stating that she began walking towards a grocery store and that she observed the defendant drive away in a vehicle that did not have a rear license plate.

The testimony of the victim's boyfriend corroborated the complainant's testimony about the events leading up to the abduction. He testified further that he was shown a picture of the defendant along with several other pictures and identified that of the defendant as representing the man who offered him and the complainant a ride on the morning of May 4, threatened him, and drove off with her. During his testimony, he also made an in-court identification of the defendant.

Medical testimony was presented confirming that the complainant had been cut on the right leg. There was also medical testimony confirming the presence of semen

and spermatozoa in the vaginal swab taken from the complainant approximately an hour and a half after her release.

The State rested its case in chief. The defense elected not to present a case. Defense counsel, however, cross-examined all of the State's witnesses at length, establishing, among other things, that the semen and spermatozoa found in the vaginal swab could not be linked directly to the defendant nor could its age be determined; that no semen was found in the crotch of the bib overalls worn by the complainant; that no semen was found on defendant's underwear or on the jeans worn by the defendant; that the complainant's fingerprints were not found either in or on the defendant's automobile. During closing argument, defense counsel reviewed the State's case in detail. He concluded by saying, "Think of all the factors I've pointed out to you. I must have pointed out to you 20, 30 reasonable doubts in my opinion. Consider those." Defense counsel also reminded the jury that the defendant had been subject to physical force by police.

The first issue on appeal is the validity of the defendant's waiver of his privilege against self-incrimination after receiving his *Miranda* rights while in custody at the Des Plaines police station.

The State contends that the appellate court erred in holding defendant's waiver invalid because it was given without knowledge that an attorney was attempting to confer with him. In support of its position, the State argues that this case is controlled by *Moran v. Burbine* (1986), 475 U.S. ——, 89 L. Ed. 2d 410, 106 S. Ct. 1135. In *Burbine*, a custodial suspect confessed after receiving and waiving his *Miranda* rights. He did so without knowledge that his sister had retained an attorney to represent him and that an associate of the attorney had been in telephone contact with the police specifically indicating that "she would act as Burbine's legal counsel in the event that the police intended to place him in a lineup or question him." While the associate was told that Burbine would not be questioned until the following day, police in fact interrogated him later that evening, securing three written statements which Burbine was unsuccessful in suppressing.

The Supreme Court concluded that a suspect's knowing and intelligent waiver of his *Miranda* rights does not require knowledge that an attorney has been retained or information that the attorney has been in contact with the police or has attempted to see the suspect. The Court held that "[o]nce it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the state's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law." (*Moran v. Burbine* (1986), 475 U.S. ——, ——, 89 L. Ed. 2d 410, 422, 106 S. Ct. 1135, 1142.) Since the *Burbine* standard was met in this case, the State urges that we apply it and hold that defendant's waiver was valid.

The defendant argues that the appellate court was correct in rejecting *Burbine* and following instead this court's decision in *People v. Smith* (1982), 93 Ill. 2d 179. Initially, defendant notes that the *Burbine* Court expressly invited the States to adopt more stringent standards for evaluating a suspect's waiver of his *Miranda* rights under applicable State constitutional provisions when it stated that "[n]othing we say today disables the States from adopting different requirements for the conduct of its employees and officials as a matter of state law." (*Moran v. Burbine* (1986), 475 U.S. ——, ——, 89 L. Ed. 2d 410, 425, 106 S. Ct. 1135, 1145.) The defendant urges that we accept this invitation and apply *Smith* to find that his privilege against self-incrimination guaranteed by article 1, section 10, of the Illinois Consti-

tution of 1970 (Ill. Const. 1970, art. I, sec. 10) was violated when the Des Plaines police and the assistant State's Attorney failed to inform him that an attorney had been contacted and was attempting to see him.

We decline defendant's invitation. In our view, *Smith* and *Burbine* are clearly distinguishable cases with *Burbine* being virtually on all fours with the instant case. Here, as in *Burbine*, a relative secured counsel for the suspect; the suspect was unaware that counsel had been retained; all communication between the police or prosecutors and the attorney was by telephone. *Smith* differs significantly from *Burbine* and the instant case. In *Smith*, the suspect actually met with an attorney after his arrest and personally retained him as counsel. Further, a partner of the retained counsel personally went to the jail where defendant was being held and asked to meet with him. She did not limit her communications to telephone conversations with the authorities or ask to be notified in the event authorities anticipated questioning her client or placing him in a lineup. Applying *Burbine*, we hold that the defendant was given his *Miranda* rights at the Des Plaines police station, that he understood the nature of those rights, and that his *Miranda* waiver was valid despite the fact that he was not told that an attorney wanted to confer with him prior to any interrogation or lineup.

The appellate court also held that defendant's *Miranda* waiver was invalid because it was secured by Detective Meese's "subterfuge." Meese told the defendant that he had received a report from the Chicago police department that his vehicle was seen in the same alley where the complainant was raped and that he would have to explain why his vehicle was there. However, no such report existed.

The State argues that this "subterfuge" does not invalidate the defendant's *Miranda* waiver. The State

maintains that neither the Supreme Court nor this court has held that a lie, misrepresentation, or half-truth is sufficient to invalidate a *Miranda* waiver. *Frazier v. Cupp* (1969), 394 U.S. 731, 739, 22 L. Ed. 2d 684, 693, 89 S. Ct. 1420, 1425 (a false statement by police that his co-defendant had confessed "is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible"); *People v. Kashney* (1986), 111 Ill. 2d 454, 465-67 (a false statement by an assistant State's Attorney that defendant's fingerprints were found at the scene of an alleged rape is insufficient to invalidate a *Miranda* waiver); *People v. Martin* (1984), 102 Ill. 2d 412, 426-27 (same).

The defendant responds by arguing that, while a misrepresentation standing alone may not invalidate a *Miranda* waiver, a mispresentation which is coercive in effect will invalidate the waiver. Defendant relies on *Lynumn v. Illinois* (1963), 372 U.S. 528, 530-35, 9 L. Ed. 2d 922, 924-27, 83 S. Ct. 917, 918-21, and *Spano v. New York* (1959), 360 U.S. 315, 319, 322-23, 3 L. Ed. 2d 1265, 1269, 1271-72, 79 S. Ct. 1202, 1205, 1206-07. In *Lynumn*, the Supreme Court invalidated a confession given after police told the defendant that, if she did not cooperate, her children would be taken away and she would lose her public aid. The Court held that these statements amounted to threats and that Lynumn's confession was coerced. In *Spano*, the defendant, upon his arrest, telephoned a close friend who, at the time, was enrolled in a police academy. On four separate occasions, the friend's police superiors ordered him to play on the defendant's sympathy by telling the defendant "that [his] telephone call had gotten him into trouble, that his job was in jeopardy, and that loss of his job would be disastrous to his three children, his wife, and his unborn child." In fact, the friend's job was in no way placed in jeopardy by the defendant's call. On the totality of the circumstances, the Court held that the defendant's will

was overborne, which rendered his confession involuntary. However, use of the defendant's friend and the friend's false statement that his job was endangered was only one of a number of factors which rendered the confession involuntary. Spano was foreign born, emotionally unstable, with no criminal history, and was subject to questioning for eight continuous hours.

Lynumn and *Spano* are clearly distinguishable from the case at bar and, in our view, do not control. Unlike *Lynumn*, Detective Meese's so-called "subterfuge" was not employed to suggest that the defendant would suffer physical, emotional, or material harm if he did not explain the presence of his automobile in the alley where the complainant was raped. Here, unlike Spano, there is no indication that the defendant lacked the capacity to understand his rights. He was questioned only briefly. Finally, Meese's statement did not threaten or imply that either the defendant or a loved one would be harmed in some way if the defendant asserted his right to remain silent rather than explain the presence of his automobile in the alley.

We also find unconvincing defendant's contentions that Meese's statement was false or misleading. It is true that Meese had not received a Chicago police report placing defendant's vehicle in the alley. However, the complainant testified that a woman saw the defendant drive into the alley where he then raped her, and the record indicates that Meese spoke to the complainant before interviewing the defendant. We hold, therefore, that defendant's waiver of his *Miranda* rights was unaffected by Meese's statement and is valid.

Defendant, however, advances a third argument in support of his contention that his *Miranda* waiver was invalid. He argues that his physical mistreatment by Schiller Park police should be imputed to the Des Plaines police and the assistant State's Attorney. Under his theory, physical coercion by one governmental entity renders involuntary any statements made to another governmental entity even though no physical force is used by the second entity. In support of this argument, defendant relies on *People v. Thomlison* (1948), 400 Ill. 555, 562-64, and *People v. Santucci* (1940), 374 Ill. 395, 398-401. In *Thomlison*, the defendant confessed to Alton, Illinois, police the day after being "brutally assaulted" by members of the same police force. In *Santucci*, the defendant confessed to Chicago police three days after being "severely beaten" by members of the Chicago police force in an unrelated incident. In both cases, this court held that the confessions were involuntary because the physical coercion of the first encounter carried over to and tainted the encounter which produced the confessions. Since the circuit court, in the instant case, suppressed defendant's statements made to the Schiller Park police because it found that there had been some type of "physical confrontation" while the defendant was in their custody, defendant concludes, on the authority of *Thomlison* and *Santucci*, that the "physical confrontation" tainted the interrogation by the Des Plaines police and the assistant State's Attorney which resulted in his oral incriminating statement. We do not agree.

Our review of the record indicates that there was no affirmative showing that the defendant was beaten by Schiller Park police. The defendant, testifying during the suppression hearing, claimed that he was beaten. However, two counts of the indictment against the defendant were for aggravated battery of two Schiller Park officers. At the conclusion of the suppression hearing, the court did not find that the defendant had been beaten but, rather, that there had been some sort of "physical confrontation." The court gave the defendant the benefit of any doubt and suppressed all statements made while in the custody of the Schiller Park police. However, in the absence of an affirmative finding of physical coercion by the Schiller Park police, there can be no coercion avail-

able to infect either the interrogation of Detective Meese of the Des Plaines police or the interrogation of Assistant State's Attorney Raphaelson.

The "physical confrontation" between the defendant and the Schiller Park police had no bearing on the events which transpired between the defendant and the Des Plaines police or the assistant State's Attorney. Accordingly, we conclude that the statements made by the defendant to the assistant State's Attorney while in the custody of the Des Plaines police was not coerced.

Defendant presses two other arguments in support of the appellate court's decision reversing his conviction. First, he contends that the State used its peremptory challenges to excuse two black prospective jurors solely on the basis of their race in violation of *Batson v. Kentucky* (1986), 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712.

We decline to address this issue because we find that the defendant, a Caucasian, does not have standing to assert a *Batson* violation. Under *Batson*, the defendant challenging the exclusion of prospective jurors because of their race must show "that members of *his race* have been impermissibly excluded" (Emphasis added.) (476 U.S. 79, ——, 90 L. Ed. 2d 69, 85-86, 106 S. Ct. 1712, 1721.) Since defendant is white and the excluded prospective jurors are black, he is unable to show that members of his race have been excluded impermissibly. Thus, he is unable to establish the threshold element of a *prima facie Batson* violation.

Defendant argues, in the alternative, that the exclusion of the only two black prospective jurors in the jury array violated his sixth amendment right to trial by a jury representing a fair cross-section of the community. Neither this court (*People v. Gaines* (1984), 105 Ill. 2d 79, 88; *People v. Williams* (1983), 97 Ill. 2d 252, 278-80) nor the Supreme Court (*Batson v. Kentucky* (1986), 476

U.S. 79, —— n.4, 90 L. Ed. 2d 69, 79 n.4, 106 S. Ct. 1712, 1716 n.4) have so held. We decline to overrule this court's prior holdings by finding that the peremptory exclusion of blacks or other minorities violates the fair cross-section requirement.

Defendant next argues that he received ineffective assistance of counsel at trial and urges this ground as an alternative basis for affirming the reversal of his conviction. According to the defendant, the State had decided not to use his inculpatory statement as part of its case in chief. However, the State reversed its position and placed the statement into evidence after defense counsel specifically mentioned the defendant's statement in opening argument before the jury. The defendant claims that this is an example of his counsel's ineffectiveness. The defendant also claims that cross-examination by counsel was often "irrelevant," "suggestive," "misleading," and "improper," forcing the trial court into frequent off-the-record admonitions. Defendant maintains that this conduct is indicative of incompetence.

To prevail on a claim that trial counsel was ineffective a defendant must show that counsel's performance fell "outside the wide range of professionally competent assistance" and "but for counsel's [incompetence], the result of the proceeding would have been different." *Strickland v. Washington* (1984), 466 U.S. 668, 690, 694, 80 L. Ed. 2d 674, 690, 698, 104 S. Ct. 2052, 2066, 2068; *People v. Collins* (1985), 106 Ill. 2d 237, 273-74; *People v. Albanese* (1984), 104 Ill. 2d 504, 525-27.

Our reading of the record leads to the conclusion that the defendant has failed to sustain his burden on either prong of the *Strickland* test. As to the competence of defendant's trial counsel, we note that he succeeded in severing three counts of the indictment against the defendant. Trial counsel also succeeded in suppressing defendant's statements made to the Schiller Park police

and was vigorous, if unsuccessful, in his efforts to suppress the incriminating statement given to the assistant State's Attorney at the Des Plaines station. Counsel's defense was effective enough to win a verdict of not guilty on the charge of aggravated battery of the victim.

Counsel was effective in creating a record which provided several grounds on which to challenge on appeal the validity of defendant's *Miranda* waiver. During selection of the jury, counsel challenged the State's use of its peremptory challenges to exclude black prospective jurors.

The record also reveals that counsel was vigorous in his cross-examination of witnesses with the apparent purpose of raising reasonable doubt in the minds of the jurors. For example, counsel brought out the fact that the complainant's fingerprints were not found either in or on the defendant's automobile. He also established that there was no semen found on defendant's underwear or other clothing and that the semen found on the complainant's clothing and in her vaginal swab could not be linked positively to the defendant. Finally, in closing argument, counsel stressed the inconsistencies he had developed during cross-examination, arguing that each one raised a reasonable doubt and that each one would support a verdict of not guilty on all counts.

The record establishes that counsel was active in his defense both in pretrial proceedings and during trial. On the totality of this record, the fact that he was first to raise defendant's inculpatory statement pales into insignificance. Further, even if we were to conclude that the reference to defendant's inculpatory statement was incompetent, it would remain incumbent upon the defendant to show that, but for that error, he would have been found not guilty. In view of the accurate and unwavering in-court and out-of-court identifications of the defendant by the complainant and her companion, we believe that

there was ample evidence adduced to find the defendant guilty beyond a reasonable doubt. Therefore, even if it was error to raise the existence of defendant's incriminating statement, it cannot be deemed prejudicial on this record. We conclude that the defendant has not established that he received ineffective assistance of counsel.

Defendant also challenges his conviction for armed robbery affirmed by the appellate court. He contends that the State failed to prove that he took the complainant's school identification and money by force or threat of force, an essential element of the offense of armed robbery. After a thorough review of the record on this issue, we find ample support for defendant's armed robbery conviction.

The complainant testified that, after the final sexual assault, the defendant returned her clothing and told her to get dressed. After she did so, the defendant told her to close her eyes and, when she asked why, replied, "it'll be easier that way. I'm going to knock you out." To avoid further physical attack, she offered the defendant "anything he wanted." She then handed over her identification and the defendant took her money. Throughout this exchnge, the defendant remained armed with the hunting knife he had displayed during the entire course of his sexual attacks on the complainant.

It is clear from the complainant's uncontradicted and unimpeached testimony that she parted with her property in order to avoid being a victim of yet another act of violence. Under these circumstances, the State proved beyond a reasonable doubt that the property of another was taken by force or threat of force. (*People v. Tiller* (1982), 94 Ill. 2d 303, 316.) We, therefore, affirm defendant's conviction for armed robbery.

Defendant's final two issues concern sentencing. He first contends that the circuit court erred in imposing an extended term sentence on the conviction of aggravated

kidnaping because it is not an offense of "the class of the most serious offense of which the offender was convicted." (Ill. Rev. Stat. 1979, ch. 38, par. 1005—8—2(a).) He contends that aggravated kidnaping is a Class 1 felony while rape and deviate sexual assault are Class X felonies. He concludes that, under the extended term sentencing provision, only the convictions for rape and deviate sexual assault can provide the basis for extended term sentences.

The State concedes that the extended term sentence for aggravated kidnaping was improper. Therefore, on the authority of *People v. Jordan* (1984), 103 Ill. 2d 192, 204-07, and *People v. Evans* (1981), 87 Ill. 2d 77, 87, we vacate defendant's sentence for aggravated kidnaping.

Defendant's final challenge is directed at the imposition of a consecutive sentence on the armed robbery conviction as well as the court's order that all sentences for the instant convictions were to be served consecutively to "any parole violations." We first consider the propriety of a consecutive sentence for the armed robbery conviction.

Section 5—8—4 of the Unified Code of Corrections (Ill. Rev. Stat. 1979, ch. 38, pars. 1005—8—4(a), (b)) provides that a consecutive sentence may be imposed where the court finds: (1) that the offense receiving the consecutive sentence was substantially different from the other offenses for which the defendant was sentenced, and (2) that imposition of a consecutive sentence is necessary to "protect the public from further criminal conduct by the defendant."

The record reveals that the circuit court expressly found that the defendant's objective changed during the course of the kidnaping. The court also found that the initial motivation for the kidnaping was sexual gratification and further found that the sexual assault was completed at the time the defendant robbed the victim. The

court then referred to the defendant's prior convictions for four armed robberies and concluded that society required protection from the defendant's future criminality. The court then ordered that the sentence for armed robbery be served consecutively to the concurrent sentences imposed for rape, deviate sexual assault, and aggravated kidnaping.

A consecutive sentence imposed pursuant to applicable law and supported by the record will not be disturbed on review. (*People v. Steppan* (1985), 105 Ill. 2d 310, 323.) We believe that the court had ample grounds to impose a consecutive sentence for the armed robbery conviction.

It is manifest beyond peradventure that, at the time of the armed robbery, the sexual assault of the complainant had terminated and that the defendant was preparing to release her. The complainant testified that the defendant had returned her clothes and that she was dressed when the defendant threatened to "knock her out," subsequently taking her identification and money. After taking possession of this property, the defendant allowed her to leave and, while leaving, she saw him drive away.

It is also clear that society requires protection from the defendant. He committed a traumatic series of sexual assaults over the course of two hours upon a teenage girl, threatened to kill her throughout the ordeal, and threatened to kill her if she reported the incident to the police. These events occurred while the defendant was on parole on four convictions for armed robbery, the same offense committed here. Thus, there is more than adequate support for the court's order that the sentence for armed robbery be served consecutively, and we affirm this order.

Defendant's second sentencing challenge is to the court's order that all sentences imposed in the instant

case were to be served consecutively to "any parole violations." He contends that a sentence consecutive to "any parole violations" is insufficiently specific and that remand for resentencing is required.

The State argues that the court meant to order that the sentences in the instant case were to be served consecutively to defendant's reconfinement for violation of parole on his prior armed robbery convictions. According to the State, the record shows the case numbers of the prior convictions in addition to a presentence report containing a notation of these convictions along with a narrative indication that a warrant for parole violation had issued, with the Prison Review Board preparing to take action at a later date.

This court has affirmed imposition of sentences consecutive to an unrelated prior sentence where the completion of the prior sentence and the beginning of the later sentence can be ascertained from the record. (*People v. Toomer* (1958), 14 Ill. 2d 385, 387.) We agree with the State that the necessary certainty can be derived from this record and, therefore, affirm the order that the sentences in the instant case are to be served consecutively to any remaining portion of the defendant's sentence for the four prior armed robbery convictions.

For the reasons stated herein, we reverse the judgment of the appellate court. We affirm defendant's convictions and all sentences with the exception of the extended term sentence for aggravated kidnaping, which is vacated. The cause is remanded to the circuit court of Cook County for resentencing on the aggravated kidnaping conviction.

Appellate court reversed;
convictions affirmed;
cause remanded.

JUSTICE CUNNINGHAM took no part in the consideration or decision of this case.

CHIEF JUSTICE CLARK, specially concurring:

I specially concur.

I concur in the result only because I agree with the State that the defendant's attorney did not in fact request access to his client. If the attorney had actually requested access to his client, the failure to so inform the client of this fact would, in my opinion, render invalid the client's subsequent waiver of his State constitutional privilege against self-incrimination. I deal with each of these points in turn.

I

The State argues, to my mind convincingly, that the defendant's attorney, Anthony Rocco, did not request access to his client. Rocco testified at the suppression hearing. He failed to mention any attempt to speak with his client. While the opinion states that the defendant's wife testified that Rocco had "related [to her] his unsuccessful efforts to see the defendant" (slip op. at 5), it does not state what these efforts were. Officer Meese testified only that Rocco called him and asked to be notified before the defendant was placed in a lineup. He further testified that he did in fact call Rocco and attempt to notify him of the lineup, leaving a message on Rocco's answering machine.

On cross-examination, Rocco asked Meese whether he, Rocco, had also told Meese that he wanted to see and speak with the defendant before interrogation. Meese denied this. Only during his closing argument on the motion to suppress did Rocco directly assert that he had asked to see the defendant.

It is elementary that the factual determinations of the trial court on a motion to suppress are not to be overturned unless manifestly erroneous. (*People v. Clark*

(1982), 92 Ill. 2d 96, 99.) The trial court here was entitled to conclude that Meese's testimony as to what Rocco had said was more credible than the defendant's wife's hearsay account of what Rocco told her he had said to Meese. As for Rocco's statement during closing argument, these were not evidence. (See *People v. Carlson* (1982), 92 Ill. 2d 440, 449.) The appellate court's contrary conclusion was based upon a misreading of the record; it is simply not true that the "defendant's attorney * * * *testified* at the pretrial hearing on the defendant's motion to suppress the defendant's statements that he asked to talk to the defendant when he spoke with Officer Meese on the telephone." (Emphasis added.) (147 Ill. App. 3d 323, 336.) He did not testify; at best, he alleged.

I would therefore reverse the appellate court on the ground that the claimed effort to prevent the attorney from conferring with his client simply did not take place. I also agree with the majority that the defendant's other claims of error are erroneous. There was no affirmative finding of a physical confrontation by the Schiller Park officers, and Meese's statement about the police report had some basis in fact. Further, I agree that the defendant, who is white, has no standing to assert a *Batson* violation based on the exclusion of black jurors. (*Batson v. Kentucky* (1986), 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712.) However, since the majority has chosen to address the attorney access issue, I take this opportunity to express my own view on its merits.

II

From time immemorial the practice of holding suspects *incommunicado* has been rightfully abhorred. Courts have viewed with suspicion efforts to prevent lawyers from meeting with their arrested clients, even where the client has not formally invoked his right to meet with the lawyer. In fact, continued interrogation of a client

who has not been informed of his attorney's contemporaneous efforts to meet with him has been nearly universally condemned.

The endorsement of such interrogation inevitably degrades and deforms our adversary system of criminal justice. It encourages law enforcement officials to treat the defendant's attorney as a supernumerary figure, an inconsequential busybody whose efforts on behalf of his client can be—and undoubtedly will be—rejected with contempt. It simultaneously weakens the client's ability to make a knowing and intelligent waiver of his rights by depriving him of a critical piece of information.

Such interrogation conflicts with an adversarial system of justice. It offends against traditional notions of justice and fair play.

I am therefore sorry to see the majority endorse this practice.

As I understand the majority's opinion, it holds either: (1) that the constitutional guarantee against self-incrimination contained in our State Constitution does not prohibit the police from denying an attorney access to his client, or (2) that our State Constitution prohibits only the denial of access to an attorney who is actually present at the site of interrogation, but not to an attorney who merely telephones the station house. Whichever is the court's actual holding, I do not agree.

To understand the nature of my disagreement it is necessary to review some of the prior case law. A review of that history demonstrates that we are not compelled by *Moran v. Burbine* (1986), 475 U.S. ——, 89 L. Ed. 2d 410, 106 S. Ct. 1135, to adopt an overly restrictive view of our own constitutional privilege against self-incrimination.

In *Escobedo v. Illinois* (1964), 378 U.S. 478, 12 L. Ed. 2d 977, 84 S. Ct. 1758, the United States Supreme

Court held that a police refusal to honor the defendant's request to consult with his lawyer during a custodial interrogation violated the defendant's sixth amendment right to the assistance of counsel. In *Escobedo* the defendant was arrested and taken to police headquarters. A lawyer retained to represent the defendant by the defendant's mother arrived shortly thereafter. When the lawyer attempted to see his client he was rebuffed both by the desk sergeant and by the homicide detectives who were interrogating the defendant. Several times the defendant asked the interrogating detectives whether he could see his lawyer, but each time the detectives told him that his lawyer did not want to see him. The defendant's eventual confession was admitted, and his motion to suppress was denied.

In *Escobedo*, the Supreme Court, basing its decision solely on the sixth amendment right to counsel, held that the defendant's confession should be suppressed where the suspect requests and has been denied an opportunity to consult with his lawyer, and where the police have not effectively warned him of his absolute constitutional right to remain silent. (378 U.S. 478, 491, 12 L. Ed. 2d 977, 986, 84 S. Ct. 1758, 1765.) However, the fact that the police had also denied the *lawyer's* requests to see his client did not pass unnoticed. The Court clearly stated that "it 'would be highly incongruous if our system of justice permitted the district attorney, the lawyer representing the State, to extract a confession from the accused while his own lawyer, seeking to speak with him, was kept from him by the police.'" 378 U.S. 478, 487, 12 L. Ed. 2d 977, 984, 84 S. Ct. 1758, 1763, quoting *People v. Donovan* (1963), 13 N.Y.2d 148, 152, 193 N.E.2d 628, 629.

While *Escobedo* was partially superseded by the Supreme Court's decision in *Miranda v. Arizona* (1966), 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, the Court clearly indicated that *Escobedo* retained independent significance. After summarizing the facts of *Escobedo*, the Court stated: "The police also prevented the attorney from consulting with his client. Independent of any other constitutional proscription, this action constitutes a violation of the Sixth Amendment right to the assistance of counsel and excludes any statement obtained in its wake." (384 U.S. 436, 465 n.35, 16 L. Ed. 2d 694, 718 n.35, 86 S. Ct. 1602, 1623 n.35.) Even in decisions later than *Miranda*, the Supreme Court continued to view *Escobedo* as a distinct holding, although it now viewed it as rooted in the fifth amendment privilege against self-incrimination rather than the sixth amendment right to counsel. See, *e.g.*, *Kirby v. Illinois* (1972), 406 U.S. 682, 689, 32 L. Ed. 2d 411, 417, 92 S. Ct. 1877, 1882.

Given this background it is far from surprising that the vast majority of State courts examining this issue prior to *Burbine* held that a suspect's waiver of *Miranda* rights would not be valid if the police neglected or refused to inform the suspect that his attorney was attempting to assist him. See, *e.g.*, *Weber v. State* (Del. 1983), 457 A. 2d 674; *Haliburton v. Florida* (Fla. 1985), 476 So. 2d 192; *State v. Matthews* (La. 1982), 408 So. 2d 1274; *Lodowski v. Maryland* (1985), 302 Md. 691, 490 A.2d 1228; *Commonwealth v. McKenna* (1969), 355 Mass. 313, 244 N.E.2d 560; *Lewis v. State* (Okla. App. 1984), 695 P.2d 528; *State v. Haynes* (1979), 288 Or. 59, 602 P.2d 272; *Commonwealth v. Hilliard* (1977), 471 Pa. 318, 370 A.2d 322 (plurality opinion); *Dunn v. State* (Tex. Crim. App. 1985), 696 S.W.2d 561; *State v. Jones* (1978), 19 Wash. App. 850, 578 P.2d 71.

The Illinois Supreme Court likewise held that "when police, prior to or during custodial interrogation, refuse an attorney appointed or retained to assist a suspect access to the suspect, there can be no knowing waiver of the right to counsel if the suspect has not been informed that the attorney was present and seeking to consult with him." (*People v. Smith* (1982), 93 Ill. 2d 179, 189.)

While the United States Supreme Court has now held that the Federal Constitution does *not* require the police to inform a suspect of an attorney's efforts to reach him, the Court carefully stated that "[n]othing we say today disables the States from adopting different requirements for the conduct of its employees and officials as a matter of state law." *Moran v. Burbine* (1986), 475 U.S. ——, ——, 89 L. Ed. 2d 410, 425, 106 S. Ct. 1135, 1145.

The majority declines to accept this invitation to read our State constitutional privilege (Ill. Const. 1970, art. I, sec. 10) more broadly than the Federal privilege. This, of course, it is entitled to do. But I am troubled that the majority has not only declined to accept the invitation but has declined it in such a peremptory fashion. Surely a question involving the interpretation of our own constitution by its ultimate arbiter deserves longer shrift.

I have already written at length on the basis of our right to give our State constitutional guarantees a more liberal interpretation than the corresponding guarantees in the Federal Constitution (*People v. Tisler* (1984), 103 Ill. 2d 226 (Clark, J., specially concurring)), and I see no need to repeat those arguments. But I do note that they have particular application to this case. It is one thing for us to seek guidance from the Supreme Court's constitutional decisions when those decisions are predictable and consistent. It is another to follow blindly where the Court itself has retreated from positions previously taken.

As the foregoing demonstrates, *Moran v. Burbine* is not simply an application of long established principles. Instead, it is a significant shift in the direction of the Supreme Court's thinking, and a direct repudiation of its statements in *Escobedo* and *Miranda*. It was no accident that nearly every State, not excluding Illinois, read those statements to mean that the undisclosed denial of attorney access would render a *Miranda* waiver invalid. Indeed, *Burbine* arguably overrules *Escobedo*, since it deprives the case of any significance other than that of precursor to *Miranda*. More profoundly, *Burbine* transforms *Miranda* from the defendant's shield into the prosecutor's sword. The presence of *Miranda* warnings will now apparently excuse police conduct which many State courts (see, *e.g.*, *People v. Donovan* (1963), 13 N.Y.2d 148, 193 N.E.2d 628) found unacceptable even before *Miranda* was decided.

Given this history, it is incumbent upon us to undertake our own examination of whether denial of attorney access violates our State constitutional privilege against self-incrimination. For several reasons, I believe that it does.

First, while *People v. Smith* (1982), 93 Ill. 2d 179, did not mention the State Constitution as an alternate ground for its decision, it cited and discussed two cases which *did* rely on their own constitutions, *State v. Haynes* (1979), 288 Or. 59, 602 P.2d 272, and *State v. Matthews* (La. 1982), 408 So. 2d 1274. (See also *Lewis v. State* (Okla. 1984), 695 P.2d 528; *Dunn v. State* (Tex. Crim. App. 1985), 696 S.W.2d 561.) Indeed, this use of State constitutions was prominently mentioned in *Smith* itself. 93 Ill. 2d 179, 188.

Second, since *Burbine* was decided, at least one State court has declined to follow it, holding that its own privilege against self-incrimination affords defendants greater protection. *People v. Houston* (1986), 42 Cal. 3d 595, 724 P.2d 1166, 230 Cal. Rptr. 141.

Third, article I, section 10, of the Illinois Constitution of 1970 was adopted during a high-water mark of political liberalism, prior to *Burbine*. To say that *Burbine* must determine our interpretation of our own constitution is, therefore, to credit those who ratified it with clairvoyance. Moreover, our constitution was adopted after *Escobedo* and *Miranda*, at a time when the United States Supreme Court itself had indicated that prevent-

ing an attorney from seeking his client violated the Federal Constitution, and when all State courts held the same. Interestingly, the committee presentation on section 10 was given to the 1970 constitutional convention by Bernard Weisberg, who had argued *Escobedo* for the defendant. (3 Record of Proceedings, Sixth Illinois Constitutional Convention 1376-77.) He, and the other members of the committee, could not have been unaware of the decision in that case.

Finally, and most importantly, there are strong policy reasons for holding that a defendant should be informed of his attorney's attempts to see him. In general, the State bears the burden of proving that a waiver of constitutional rights is valid. (*See, e.g., Brewer v. Williams* (1977), 430 U.S. 387, 51 L. Ed. 2d 424, 97 S. Ct. 1232.) An attorney's communication to the police about his client is an event which has a direct bearing upon whether a waiver is knowing or intelligent. For, "[t]o pass up an abstract offer to call some unknown lawyer is very different from refusing to talk with an identified attorney actually available to provide at least initial assistance and advice, whatever might be arranged in the long run. A suspect indifferent to the first offer may well react quite differently to the second." (*State v. Haynes* (1979), 288 Or. 59, 72, 602 P.2d 272, 278.) It is significant that the American Bar Association filed an *amicus* brief on the defendant's behalf in *Burbine*, and that the ABA standards for criminal justice mandate that a lawyer be allowed to see his client. (ABA Standards for Criminal Justice secs. 5—5.1, 5—7.1 (2d ed. 1980).) Beyond this, acceptance of *Burbine* would seem to lead to the proposition that the police have an absolute right to hold suspects *incommunicado*.

I also cannot accept the majority's attempt to distinguish between personal visits and telephone calls. While it is true that *Smith* involved an attorney who appeared at the station house, the court in *Smith* favorably cited

two cases. *State v. Matthews* (La. 1982), 408 So. 2d 1274, and *State v. Jones* (1978), 19 Wash. App. 850, 578 P.2d 71, which did involve telephone calls. Nor should the manner of attempted communication make any difference. In an age of modern transportation and communication, an attorney who telephones is very nearly as "available" to speak with the defendant as an attorney who has actually arrived at the station house. In any case, I note that the majority's attempt to distinguish *Smith* preserves for later consideration the issue of whether our State Constitution grants a broader privilege against self-incrimination in cases where the attorney is actually present.

JUSTICE SIMON, dissenting:

"Confessions of the accused are among the most powerful weapons employed in the prosecution of crimes. Nothing else can equal the impact upon the fact finder of an apparent admission of guilt by the party charged." (2 J. Cook, Constitutional Rights of the Accused 21 (2d ed. 1986); *People v. Prohaska* (1956), 8 Ill. 2d 579, 585 (confession of guilt is evidence of a "high and convincing character").) Therefore, courts must endeavor to ensure that confessions that reach the jury are reliable and voluntary products of police investigation and interrogation. The procedures used by the police in this case to obtain defendant's confession—physical force, misrepresentation, and separation of counsel and client—undermine the reliability of the resulting confession and are impermissible under both State and Federal law. The trial court's failure to suppress the resulting nonvoluntary confession constitutes error entitling defendant to a new trial. In addition, because all prospective black jurors were kept from service on the jury through the State's use of peremptory challenges, defendant is entitled at the very least to a hearing on whether those jurors were unconstitutionally excluded from the jury which convicted him in violation of *Batson v. Kentucky* (1986), 476

U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712. See also *Griffith v. Kentucky* (1987), 479 U.S. ——, 93 L. Ed. 2d 649, 107 S. Ct. 708 (*Batson* applies retroactively to cases where the conviction had not become final before the new rule was announced).

A review of the circumstances surrounding defendant's confession to the Des Plaines police reveals three factors which combined to induce defendant's involuntary confession: physical injuries suffered by defendant while in the custody of the Schiller Park police, misrepresentations made to defendant by the Des Plaines police in order to induce defendant to confess, and the separation of defendant and his attorney during the period of police interrogation. I will address each of these factors separately.

At the suppression hearing, defendant testified that he was beaten by Schiller Park police. He described two episodes of brutality in which he was kicked, hit, and knocked to the ground, punched and beaten with a nightstick, raised off the floor by elevating his handcuffed arms behind him, and his hair was pulled. Defendant testified that as a result he suffered pain in his ribs and in his right knee, and that he lost tufts of hair. Defendant's claims of mistreatment were corroborated by his attorney's testimony that at their first meeting defendant told him that he had been beaten and showed the attorney his visibly injured knee. Defendant received no medical treatment for his injuries while at the Schiller Park or Des Plaines police stations on the day of his interrogation and confession. After a medical examination at Cermak Hospital the following day, defendant was informed that he probably had fractured ribs in the midchest area, advised to treat his injured knee with sitz baths, and given pain medication. After hearing all the evidence at the suppression hearing, the trial judge determined that the "apparently very severe physical confrontation" between defendant and the police warranted

suppression of inculpatory statements made by defendant at the Schiller Park police station. The trial judge declined to suppress statements made at the Des Plaines station, however, in part because no additional physical cruelty was proven to have been exerted against defendant in Des Plaines.

It is axiomatic that confessions obtained through physical brutality or force may not be used as evidence to secure a conviction against the accused. (*Brown v. Mississippi* (1936), 297 U.S. 278, 285-86, 80 L. Ed. 682, 687, 56 S. Ct. 461, 464-65; *People v. O'Leary* (1970), 45 Ill. 2d 122, 125; *People v. Davis* (1966), 35 Ill. 2d 202, 205; *People v. Cunningham* (1964), 30 Ill. 2d 433, 436; *People v. Prohaska* (1956), 8 Ill. 2d 579, 585; *People v. Davis* (1948), 399 Ill. 265, 271.) In addition, brutality may render inadmissible not only inculpatory statements made by the accused during the beating or mistreatment, but also statements made later which are deemed to be tainted by the earlier brutality. *People v. Thomlison* (1948), 400 Ill. 555; *People v. Santucci* (1940), 374 Ill. 395.

Here, the defendant confessed within approximately six hours of sustaining significant injuries while in the custody of the Schiller Park police. When asked "Did you confess because * * * you were hurt?" the defendant replied, "Yes, I wanted people to just leave me alone." That defendant suffered no additional physical brutality at the Des Plaines station (a fact which defendant disputes) does not vitiate the physical coercion to which defendant had already been subjected, especially because at the time of his confession defendant had received no medical treatment for his injuries. In view of these circumstances, the numerous *Miranda* warnings defendant received before confessing, and his experience in dealing with the police, could not cure the coercive effect of the actions of the Schiller Park police. Therefore, defendant's Des Plaines confession was tainted by the physical

confrontation in Schiller Park, and the trial court erred in concluding that the confession was admissible.

The majority's suggestion that "there can be no coercion available to infect [defendant's statements]" in the "absence of an affirmative finding of physical coercion" (slip op. at 14) is not accurate. Here, it is uncontroverted that defendant sustained numerous injuries while in the hands of Schiller Park police. The trial court's finding that a "very severe physical confrontation" had taken place necessarily includes a finding of coercion; otherwise, the trial court would not have suppressed defendant's statements. In this light, the majority's insistence on an "affirmative finding" of brutality is little more than a semantic game.

The second factor which rendered defendant's confession inadmissible is the subterfuge used by the Des Plaines police to coerce defendant into confessing. Officer Meese of the Des Plaines police admitted at trial that he made untrue statements to defendant during the interrogation which led to defendant's confession. Specifically, Meese told defendant that the Des Plaines police had received a report identifying his car at the scene of the crime:

> "At that time I indicated to him that we were notified by the City of Chicago that his vehicle was observed in the alley involved in a rape incident, and that he could not be identified, but that he would have to explain why the vehicle was there."

Meese's misrepresentation achieved its desired result. Although defendant had already given a statement denying involvement in the crime, defendant gave another statement following Meese's subterfuge in which he confessed.

In *Miranda v. Arizona* (1966), 384 U.S. 436, 476, 16 L. Ed. 2d 694, 725, 86 S. Ct. 1602, 1629, the United States Supreme Court stated that:

> "[A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver [of the fifth amendment privilege against self-incrimination] will, of course, show that the defendant did not voluntarily waive his privilege."

(See also *Moran v. Burbine* (1986), 475 U.S. 412, 421, 89 L. Ed. 2d 410, 421, 106 S. Ct. 1135, 1141 (relinquishment of *Miranda* rights "must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception"); see, *e.g.*, *People v. Hogan* (1982), 31 Cal. 3d 815, 647 P.2d 93, 183 Cal. Rptr. 817 (confession inadmissible due to misrepresentation); *State v. Howard* (Tenn. Crim. App. 1981), 617 S.W.2d 656 (same); *Commonwealth v. Meehan* (1979), 377 Mass. 552, 387 N.E.2d 527 (same).) In assessing whether misrepresentation renders a defendant's confession involuntary and therefore inadmissible this court has applied a totality-of-circumstances test. Under this test misrepresentation is only a factor to be considered, along with "age, education and intelligence of the accused, the duration of questioning, and whether he received his constitutional rights or was subjected to any physical punishment." *People v. Kashney* (1986), 111 Ill. 2d 454, 466-67, quoting *People v. Martin* (1984), 102 Ill. 2d 412, 427.

Applying this test to the facts in this case compels the conclusion that defendant's confession was inadmissible. Not only had the defendant been subjected to severe physical brutality, but also he was kept incommunicado from his attorney in violation of his constitutional rights. In addition, defendant had been in police custody since early that morning and had been questioned by two different police departments and at least two assistant State's Attorneys. The fact that defendant had received repeated *Miranda* warnings is of little significance in the face of these coercive conditions and the extended interrogation to which the defendant was subjected.

Based on its reading of *Spano v. New York* (1959), 360 U.S. 315, 3 L. Ed. 2d 1265, 79 S. Ct. 1202, and *Lynumn v. Illinois* (1903), 372 U.S. 528, 9 L. Ed. 2d 922, 83 S. Ct. 917, the majority concludes that the subterfuge employed by Officer Meese did not coerce the defendant's confession because it was "not employed to suggest that the defendant would suffer physical, emotional, or material harm" or that "the defendant or a loved one would be harmed in some way" if the defendant refused to confess. (Slip op. at 13.) This is an overly narrow reading of *Lynumn* and *Spano;* these cases did not establish a requirement that the defendant or his loved ones be directly threatened with harm before a misrepresentation can be deemed to have a coercive effect powerful enough to invalidate defendant's confession. Instead, the central inquiry under *Spano* and *Lynumn* is whether, considering the totality of circumstances, the defendant's will was overborne by the techniques employed by the police in obtaining the confession. (*Spano*, 360 U.S. at 323, 3 L. Ed. 2d at 1271-72, 79 S. Ct .at 1207; *Lynumn*, 372 U.S. at 534, 9 L. Ed. 2d at 926, 83 S. Ct. at 920.) Under this approach, defendant need not establish threats of the same directness or magnitude as those in *Spano* or *Lynumn* in order to establish that his will was overborne. Here, the effect of the officer's subterfuge, which falsely implied that the police had eyewitness evidence against defendant, must be judged in light of the facts that defendant was suffering physical injuries and had already been interrogated and given an exculpatory statement. Under these circumstances, defendant's confession cannot be characterized as "the product of a rational intellect and a free will.'" *Lynumn*, 372 U.S. at 534, 9 L. Ed. 2d at 926, 83 S. Ct. at 920, quoting *Blackburn v. Alabama* (1963), 361 U.S. 199, 208, 4 L. Ed. 2d 242, 249, 80 S. Ct. 274, 280); *People v. Kincaid* (1981), 87 Ill. 2d 107, 117.

Even before the United States Supreme Court announced its decision in *Miranda v. Arizona* prohibiting

trickery in obtaining confessions, this court had denounced the use of trickery and falsehood to coerce a defendant's confession. (See *People v. Stevens* (1957), 11 Ill. 2d 21, 27.) We should continue to denounce and deter these practices by rendering the fruit of such tactics inadmissible, especially where, as here, defendant's confession was elicited through knowing and deliberate misrepresentation by the police with the specific intent to induce defendant's confession. See *Spano*, 360 U.S. at 324, 3 L. Ed. 2d at 1272, 79 S. Ct. at 1207 (where an "undeviating intent of the officers to extract a confession * * * is shown * * * the confession obtained must be examined with the most careful scrutiny"); see also *People v. Kashney* (1986), 111 Ill. 2d 454, 467 (Goldenhersh, J., concurring in part and dissenting in part) (contending that use of deceptive practices by the police in obtaining confessions violates *Miranda*); *People v. Martin* (1984), 102 Ill. 2d 412, 429 (Goldenhersh, J., dissenting) (same).

The third factor which indicates that defendant's confession was improperly obtained and should be suppressed is the way in which the defendant was kept incommunicado from his attorney. I agree with Chief Justice Clark's analysis of this issue in the specially concurring opinion, and thus will not repeat those arguments here. I disagree with the special concurrence, however, on two points. First, there was sufficient evidence to establish that defendant's attorney requested access to defendant during the interrogation period. Defendant's wife testified at the suppression hearing that the attorney had attempted to contact the defendant. Also, although the attorney's closing statement in the suppression hearing (in which he detailed his attempts to contact defendant) was not sworn testimony, as an officer of the court the attorney was under a continuing ethical duty to speak truthfully, and we have no reason to doubt his veracity. Furthermore, the trial court recognized that he was in-

troducing facts in his closing not presented in testimony, but allowed him to continue over the State's objection. Under these circumstances the attorney had every reason to believe his statement was being accepted by the court as the functional equivalent of testimony, and I would regard the statement as such. His attempts to contact his client were also enumerated in the written motion to suppress defendant's confession filed before the suppression hearing. Moreover, as the appellate court noted, the testimony of the officer who claimed that the attorney had not requested access to the defendant had been severely discredited.

Second, because of a critical factual difference between this case and *Moran v. Burbine* (1986), 475 U.S. 412, 89 L. Ed. 2d 410, 106 S. Ct. 1135, I am not convinced that *Burbine* controls the result here under Federal law. In *Burbine*, the defendant never expressed any desire for an attorney. The Court repeatedly noted the significance of this factor in its decision: "At no point during the course of the investigation * * * did [defendant] request an attorney * * * he '[did] not want an attorney called or appointed' * * * he had access to a telephone, which he apparently declined to use * * * he at no point requested the presence of a lawyer." (475 U.S. at 415, 417-18, 420, 89 L. Ed. 2d at 417, 418, 420, 106 S. Ct. at 1138, 1139, 1141.) The Court also reiterated the *Miranda* requirement that "[i]f the individual indicates *in any manner, at any time prior to* or during questioning, that he wishes to remain silent, [or if he] states that he wants an attorney, the interrogation must cease." (Emphasis added.) (475 U.S. at 420, 89 L. Ed. 2d at 420, 106 S. Ct. at 1141, quoting *Miranda v. Arizona* (1966), 384, U.S. 436, 473-74, 16 L. Ed. 2d 694, 723, 86 S. Ct. 1602, 1627.

In the present case it is undisputed that a Schiller Park police officer called defendant's wife from the station and discussed defendant's arrest and bail with her. The officer then put defendant on the line, at which time

defendant instructed his wife to retain a specific attorney in his behalf. Thus, in this case, unlike *Burbine*, it is uncontested that defendant had actively sought the advice and counsel of an attorney prior to interrogation and confession. Defendant in this case, unlike the defendant in *Burbine*, had every expectation that an attorney would be contacting him. Defendant was persuaded to confess only after the police had successfully kept the defendant and his attorney separated prior to and during the interrogation period. Perhaps defendant lost hope that the attorney would actually appear for his defense, or without the benefit of counsel simply gave in to the pressure to confess exerted by his interrogators.

Also, the Court in *Burbine* noted as significant that there was no evidence of physical coercion, and that the defendant initiated the confession conversation. In contrast, defendant in the present case had been physically injured at the hands of police only a few hours earlier, and had already been subjected to repeated interrogation initiated by the police before he confessed. I would hold, therefore, that because of the critical factual differences between *Burbine* and the present case, *Burbine* does not control the result in this case. We should look to the United States Supreme Court's earlier statements in *Miranda* and *Escabedo*, as discussed in the special concurrence, for the resolution of the separation of attorney and client issue. See, *e.g.*, *Miranda*, 384 U.S. at 746, 16 L. Ed. 2d at 724-25, 86 S. Ct. at 1629 ("Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights").

In sum, it is clear that the combined conduct of the Schiller Park and Des Plaines police in this case rendered defendant's confession involuntary and that the

confession therefore should be suppressed. In the words of Chief Justice Earl Warren:

> "The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." *Spano v. New York* (1959), 360 U.S. 315, 320-21, 3 L. Ed. 2d 1265, 1270, 79 S. Ct. 1202, 1205-06.

Even if defendant's confession could be deemed voluntary and admissible, defendant's conviction is still drawn into question by the State's use of peremptory challenges to exclude black persons from the jury. Two black potential jurors, the only black persons on a venire of 40 people, were eliminated by the State through the exercise of its peremptory challenges, resulting in an all-white jury. Defendant contends that the exclusion of black persons from the jury violated his fourteenth amendment right to equal protection of the laws and his right to a jury selected from a representative cross-section of the community under the sixth amendment. The majority concludes that defendant does not have standing to assert a *Batson* violation on equal protection grounds because he is white and the excluded prospective jurors are black, and dismisses defendant's sixth amendment arguments as precluded by this court's earlier rulings.

Even if *Batson* forecloses challenges to the discriminatory use of peremptory challenges under an equal protection analysis when the defendant is not a member of the class excluded from the jury, it in no way endorses the continued discriminatory exclusion of black people from juries. The *Batson* Court noted that the use of peremptory challenges to exclude black persons was impermissible based on three factors: harm to the defendant, harm to the juror, and harm to the community. Minorities, according to the Court, have an interest independent from the defendant's in serving as jurors:

> "Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. * * * A person's race simply "is unrelated to his fitness as a juror.' [Citation.] As long ago as *Strauder*, therefore, the Court recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror." (*Batson*, 476 U.S. at ——, 90 L. Ed. 2d at 81, 106 S. Ct. at 1717-18.)

The community also has an interest in preventing discriminatory exclusion from jury service:

> "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. *Batson*, 476 U.S. at ——, 90 L. Ed. 2d at 81, 106 S. Ct. at 1718.

The Supreme Court used sweeping language throughout *Batson* in renouncing as unconstitutional exclusion of black persons from the jury, evincing a commitment to prohibit discriminatory exclusion tactics in their entirety: "the Constitution prohibits *all forms* of purposeful racial discrimination in the selection of jurors." (Emphasis added.) (476 U.S. at ——, 90 L. Ed. 2d at 82, 106 S. Ct. at 1718.) The Court noted that in many State and Federal courts "the [peremptory] challenge may be, and unfortunately at times has been, used to discriminate against black jurors," and concluded that "[i]n view of the heterogeneous population of our nation, public respect for our criminal justice system and the rule of law

will be strengthened if we ensure that no citizen is disqualified from jury service because of his race." 476 U.S. at ——, 90 L. Ed. at 89, 106 S. Ct. at 1724.

Furthermore, the *Batson* Court made clear that the prohibition against discriminatory tactics now applies not only to the selection of the jury panel or venire, but equally to the selection of the petit jury. "While decisions of this Court have been concerned largely with discrimination during selection of the venire, *the principles announced there also forbid discrimination on account of race in the selection of a petit jury.*" (Emphasis added.) (476 U.S. at ——, 90 L. Ed. 2d at 82, 106 S. Ct. at 1718.) Thus, fair venire selection is only the threshold requirement for properly selecting a jury. The State cannot be allowed, after seating a proper venire, to pervert the jury selection process by using peremptory challenges to ensure that minorities are kept off the jury. *Batson*, 476 U.S. at ——, 90 L. Ed. 2d at 82, 106 S. Ct. at 1718 ("the State may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at 'other stages in the selection process' ").

A logical extension of the language in *Batson* would prevent exclusion of black people from the jury through the use of peremptory challenges regardless of whether the defendant is a member of the excluded class, based on the juror's and the community's independent interests in a fairly selected jury, as well as the defendant's interest. Defendant has suggested the proper rationale for the extension of the principle: defendant's sixth amendment right to a representative cross-section of the community on the jury. A sixth amendment challenge is particularly appropriate in the present case, where the defendant is white and the excluded jurors are black, because a defendant need not be a member of the excluded class in order to raise a fair cross-section challenge. *Duren v. Missouri* (1979), 439 U.S. 357, 359 n.1, 58 L. Ed. 2d 579, 583 n.1, 99 S. Ct. 664, 666 n.1; *Peters v. Kiss* (1972), 407 U.S. 493, 33 L. Ed. 2d 83, 92 S. Ct. 2163 (white defendant could raise sixth amendment claim based on the exclusion of blacks).

Under the sixth amendment, a defendant is entitled to a fair cross-section of the community on the jury. (*Taylor v. Louisiana* (1975), 419 U.S. 522, 42 L. Ed. 2d 690, 95 S. Ct. 692.) This has been interpreted to guarantee that the jury venire be selected in a nondiscriminatory manner from a source fairly representative of the community, even though Taylor does not go so far as to guarantee a representative petit jury. But as already mentioned, *Batson* has added an additional dimension to this analysis: although a petit jury selected from a proper panel need not necessarily reflect a cross-section of the community, discriminatory tactics designed to manipulate the ultimate composition of the petit jury will no longer be tolerated. As the United States Court of Appeal for the Second Circuit phrased it in *Roman v. Abrams* (2d Cir. 1987), 822 F.2d 214, 226, 229:

> "[T]he sixth amendment guarantees only the *possibility* of a petit jury reflecting a cross section of the community and forbids the prosecutor to exercise his peremptories discriminatorily in a manner that eliminates that possibility. * * * [W]hat the sixth amendment guarantees to a defendant is not that he will have a petit jury of any particular composition but that he will have the *possibility* of a jury that reflects a fair cross section of the community. The prosecutor violates sixth amendment rights when he starts out to eliminate that possibility." (Emphasis in original.)

The *Roman* court also articulated the *prima facie* showing that should be required for a defendant to establish a violation of the sixth amendment right to the possibility of a fair cross-section on the petit jury. To establish a *prima facie* case, a defendant must show that

"'(1) the group alleged to be excluded is a cognizable group in the community, and (2) there is substantial likelihood that the challenges leading to this exclusion have been made on the basis of the individual venireperson's group affiliation rather than because of any indication of a possible inability to decide the case on the basis of the evidence presented.'" *Roman*, 822 F.2d at 223, 225, quoting *McCray v. Abrams* (2d Cir. 1984), 750 F.2d 1113, 1131-32).

I raised an argument challenging the use of discriminatory peremptory challenges in the selection of petit juries as violative of the sixth amendment fair cross-section requirement, as well as arguments that such challenges are forbidden under our State constitution and that this court should exercise its supervisory authority to ensure that discriminatory tactics are not successful in *People v. Payne* (1983), 99 Ill. 2d 135, 140 (Simon, J., dissenting). I will not repeat those arguments here except to note the effect that *Batson* has on this court's prior decistions rejecting a sixth amendment prohibition on the discriminatory use of peremptory challenges.

In the wake of *Batson*, nothing precludes this court from holding that the use of peremptory challenges to exclude black jurors, even where the defendant is not black, violates the fair cross-section requirement of the sixth amendment. The opinions relied on by the majority—*Payne*, *People v. Williams* (1983), 97 Ill. 2d 252, and *People v. Gaines* (1984), 105 Ill. 2d 79—were based on precedent that has now been overturned. In those cases defendants argued that use of peremptory challenges to exclude black people from the jury violated both their fourteenth amendment rights to equal protection and their sixth amendment right to a fair cross-section of the jury. In support of their sixth amendment arguments, the defendants relied on *Taylor v. Louisiana* (1975), 419 U.S. 522, 42 L. Ed. 2d 690, 95 S. Ct. 692, in which the United States Supreme Court held that the sixth amendment right to a jury trial includes the right to have a petit jury selected from a representative cross-section of the community. In all of those cases, however, this court held that an earlier Supreme Court case, *Swain v. Alabama* (1965), 380 U.S. 202, 13 L. Ed. 2d 759, 85 S. Ct. 824, must be read into *Taylor* and therefore that *Swain* controlled the resolution of the peremptory challenge issue under a sixth amendment analysis. Under *Swain*, an equal protection case, to establish discrimination in the use of peremptory challenges, a defendant was required to demonstrate systematic and purposeful exclusion of minorities in case after case. *Swain* has now been overruled by *Batson*, thereby, calling into question the holdings in those cases relying on Swain, including *Payne*, *Williams*, and *Gaines*. Thus, this court writes on a clean slate, and it would be incongruous for this court not to read the *Batson* decision into the sixth amendment analysis of *Taylor*—thereby prohibiting the use of peremptory challenges to exclude black persons from petit juries under the sixth amendment—after insisting for so long on reading *Swain* into *Taylor*.

It is not our concern to ponder the motivation for the State's attempt to exclude black persons from the jury in a particular case when the defendant is not black, but simply to ensure that it is not successful in doing so. Discrimination against black people is no less reprehensible simply because the defendant happens to be white. As acknowledged by the Supreme Court in *Batson*, black persons have an interest in serving as jurors independent from and in addition to the right of the defendant to a jury selected in a nondiscriminatory manner from a representative cross-section of the community, and interference with these rights should not be tolerated by this court for any reason.

In view of the long and unjustifiable history in this State of exclusion of black persons from jury service through the use of peremptory challenges (see *People v.*

Lewis (1984), 103 Ill. 2d 111, 122 (Simon, J., dissenting) (listing cases in which peremptory challenges were used to exclude potential black jurors); *People v. Payne* (1983), 99 Ill. 2d 135, 152 (Simon, J., dissenting) (same), I urge this court not to wait until the United States Supreme Court explicitly denounces the use of peremptory challenges to exclude minorities from the jury where the defendant is a nonminority, but instead to take the initiative, under the unequivocal condemnation of such procedures in *Batson*, in outlawing all discrimination against black persons in the jury selection system in this State. Some post-*Batson* courts have already held that discriminatory use of peremptory challenges is prohibited under the sixth amendment. See, *e.g.*, *Roman v. Abrams* (2d Cir. 1987), 822 F.2d 214; *Booker v. Jabe* (6th Cir. 1986), 801 F.2d 871; *Fields v. People* (Colo. 1987), 732 P.2d 1145.

At the very least this matter should be sent back to the trial court for a hearing to determine whether black persons were improperly excluded from service on the jury. For these reasons I respectfully dissent.

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No. 64182—People State of Illinois, appellant, v. Daniel Holland, appellee. Appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on April 15, 1988.

SUPREME COURT OF THE UNITED STATES

No. 88-5050

DANIEL HOLLAND,

Petitioner

v.

ILLINOIS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

February 27, 1989

(5)

No. 88-5050

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DANIEL HOLLAND,

Petitioner,

v.

ILLINOIS,

Respondent.

On Writ Of Certiorari To
The Supreme Court Of Illinois

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QUESTIONS PRESENTED

1. Whether the State's use of peremptory challenges to remove black prospective jurors on grounds of race violates the Sixth Amendment right to trial by jury.

2. Whether petitioner, a white man, has standing to challenge as violative of that constitutional right the removal by the prosecutors of black prospective jurors from the jury in petitioner's case.

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C. CONSTITUTIONAL PROVISIONS

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OPINIONS BELOW

The decision of the Illinois Appellate Court, First District, ordering retrial in this cause is reported as *People* v. *Daniel Holland*, 147 Ill.App.3d 323, 509 N.E.2d 1230 (1986) and is contained in the Joint Appendix at pp. 16-52. The opinion of the Illinois Supreme Court reversing the appellate court and reinstating the convictions is reported as *People* v. *Daniel Holland*, 121 Ill.2d 136, 520 N.E.2d 270 (1987) and is included in the Joint Appendix at pp. 53-100.

JURISDICTION OF THE COURT

The jurisdiction of this Court is based on 28 U.S.C. section 1257(3). The opinion of the Illinois Appellate Court was issued August 29, 1986 and leave to appeal by the State was filed with the Supreme Court of Illinois. The Illinois Supreme Court accepted the cause for review and rendered its decision on December 21, 1987. Petitioner thereafter submitted a request for rehearing but rehearing was denied on April 5, 1988. Petitioner subsequently filed his petition for a writ of certiorari with this Court on June 3, 1988. This Court granted that petition by its ruling of February 27, 1989.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Holland elected to submit the question of his guilt or innocence of the charges against him (rape, deviate sexual assault, armed robbery, aggravated battery, and aggravated kidnapping) to a jury for determination. Consequently, prospective jurors were summoned to the courtroom for selection as members of his jury. Among the 30 (J.A. 7), 35 (J.A. 8) or 40 (J.A. 8, 13) assembled prospective jurors were two blacks, Ms. Conley and Mr. Mosly. (J.A. 8-10) Both black potential jurors were questioned by the judge on their qualifications to serve as jurors in the case.

Ms. Conley related she resided in Chicago where she had lived for 6 years. She currently lived with her parents, having graduated that June from Northeastern University with a bachelor of science degree. Both of her parents were employed at Rockford Paper Mills, with her father working in the maintenance department and her mother packing boxes in the packing section. (J.A. 2-3)

She had never served as a juror before and knew none of the lawyers or the petitioner. She had heard nothing about the case nor had she read anything concerning it.

None of her friends or relatives were employed by any police force or by the State's Attorney's Office. Neither she nor a member of her family nor any close friend had ever been a crime victim. (J.A. 3)

Nothing about the nature of the charges in the case in any way prevented her from returning a fair and impartial verdict if she were selected as a juror in the case. She felt no bias or prejudice against an accused simply because he was charged with a crime. She knew of no reason whatsoever why she could not render a fair and impartial verdict in the case if serving as a juror. (J.A. 3-4)

Without any effort to inquire into difficulties Ms. Conley might have participating as a juror, the prosecutor summarily dismissed her immediately following her responses. (J.A. 4)

Subsequently, Mr. Mosly explained he resided in Chicago, having lived in his home at the time for 3 months. Prior to this home, he had dwelt in Chicago and had lived in that residence for 11 years. He was living with his wife who had been employed in a clerical capacity with Allstate Insurance for a year and a half. Mr. Mosly worked as an inventory clerk for Polk Brothers where he had been employed about two months. Before that, he had been attending school at Northeastern University as a general student. (J.A. 4-5)

He knew none of the lawyers and did not know petitioner Holland. Nor had he heard or read about the case. He had no friends or relatives in either the State's Attorney's Office or on any police force. He possessed no bias or prejudice against a person for being charged with a crime and there was nothing about the nature of these charges which would cause him to lose his fairness and impartiality. (J.A. 5)

Mr. Mosly acknowledged a friend of his had been a murder victim in Chicago about 3 weeks earlier but there was nothing about that experience which caused him to conclude he could not be fair and impartial as a juror in this case. Neither he nor any members of his family nor a close friend had ever been accused of a crime. He could not discover any reason why he could not render a fair and impartial verdict if chosen as a juror. (J.A. 6)

Again without seeking to explore possible grounds for Mr. Mosly's inability to serve as a juror, the prosecutor peremptorily excused this second black prospective juror as well. (J.A. 6)

Counsel thereafter voiced objection to the State's use of its peremptory challenges to remove the only available black prospective jurors. Counsel contended:

> "the defendant has a right to be—to a jury to be drawn from a representative cross section of the community and be tried by a representative cross section of the community. The State has systematically excluded the two blacks. It did not even ask them one question; just took one look at them and excused them pursuant to their right to a peremptory challenge." (J.A. 7-8)

The State responded to this objection by claiming the peremptory challenges were not based on race and such use had not been its intent. (J.A. 9)

Counsel replied he relied on *People* v. *Wheeler*, *Commonwealth* v. *Soares*, and the *Taylor* case in this Court and claimed the white petitioner could also object to peremptory challenges used to exclude black prospective jurors, stressing "in our case the defendant has an identical protection under the Sixth Amendment against the systematic removal of blacks from the venire." (J.A. 9-10) Counsel urged application of *Wheeler* to conclude the

prosecution struck all members of a cognizable group who shared only one characteristic—their race—and did so "simply because of their race and not any specific bias." (J.A. 10-11) Counsel thus concluded "the prospective jury, so far, has not been a representative cross section of the community and my defendant's Sixth Amendment right to a jury trial has been violated." (J.A. 11-12)

The judge thereupon denied the motion "in toto and all respects" on the basis of *Swain* v. *Alabama* and Illinois decisions contrary to *Wheeler*. (J.A. 13-15) Petitioner was subsequently convicted before the all-white jury of deviate sexual assault, rape, armed robbery, and aggravated kidnapping. (Supp.R. 267)

On appeal to the Illinois Appellate Court, First District, his convictions were reversed and he was ordered retried for error in failing to suppress his statements. (J.A. 16-47) The court did not rule on petitioner's alleged error in such removal of black prospective jurors given its remand on other grounds and the assumption any error would not be repeated. (J.A. 20)

On State appeal, the Illinois Supreme Court overturned the appellate court's order of retrial and rejected petitioner's claims of error in excusing black potential jurors. It first determined petitioner had no standing to argue under *Batson* v. *Kentucky* since he was white. (J.A. 70) It then rebuffed petitioner's Sixth Amendment claim as follows:

> "Defendant argues, in the alternative, that the exclusion of the only two black prospective jurors in the jury array violated his sixth amendment right to trial by a jury representing a fair cross section of the community. Neither this court (*People* v. *Gaines* (1984), 105 Ill.2d 79, 88; *People* v. *Williams* (1983), 97 Ill.2d 252, 278-80) nor the Supreme Court (*Batson* v.

Kentucky (1986), 476 U.S. 79,—n 4, 90 L.Ed.2d 69, 79 n 4, 106 S.Ct. 1712, 1716 n 4) have so held. We decline to overrule this court's prior holdings by finding that the peremptory exclusion of blacks or other minorities violates the fair cross section requirement." (J.A. 70-1)

Justice Simon dissented from this holding, concluding petitioner had stated a basis for finding a valid allegation of constitutional infringement of the right to trial by impartial jury. (J.A. 94-100) Consequently, he would remand for a hearing into the State's explanation of its peremptory challenges. (J.A. 100) However, because no such hearing was ordered by the Illinois Supreme Court, the State remained unobliged to account for its exclusions of the only two available black prospective jurors and its creation of an all-white jury.

SUMMARY OF ARGUMENT

The narrow question presented by this case is whether the use of peremptory challenges by a prosecutor to excuse black venirepersons solely on the basis of their race, found to violate the Fourteenth Amendment Equal Protection Clause in *Batson* v. *Kentucky*, also violates the Sixth Amendment right to trial by an impartial jury. The *Batson* rule, based on the Fourteenth Amendment Equal Protection Clause, applies only in cases where the defendant himself is a member of the cognizable group excluded from the petit jury. A similar rule predicated on the Sixth Amendment would apply in all cases, irrespective of the race of the defendant and would, therefore, apply to petitioner, who is white.

The Sixth Amendment requires that petit juries be drawn from a fair cross-section of the community. This Court in *Taylor* held that the purpose of the fair cross-section rule—"to make available the commonsense judg-

ment of the community as a hedge against the over zealous or mistaken prosecutor and in preference to the professional or perhaps unconditioned or biased response of a judge"—is frustrated if distinctive groups are excluded from the jury pool. This purpose is no less frustrated if the prosecutor excludes members of those distinctive groups from actual jury service by racially motivated use of the peremptory challenge.

The fair cross-section requirement cannot guarantee that the petit jury will proportionately represent the community or even that a member of a particular defendant's race will sit on the jury. This goal appears to be impossible. But the fair cross-section requirement is meaningless if it does not lead to the representation of diverse elements of the community on trial juries. However perfectly representative it may be, the venire itself makes no decisions. If the Sixth Amendment requires that the venire represent a fair cross-section of the community, it is because the defendant must have a fair possibility that the petit jury will, to the extent possible, be similarly constituted. The Sixth Amendment does not mandate that the representative character of the venire be carried over to the petit jury. It does, however, prohibit racially motivated elimination of this possibility. If the Sixth Amendment requirement that petit juries be drawn from a fair cross-section of the community is to have anything other than cosmetic meaning, it must require that the petit jury be *fairly* drawn from the venire, without exclusion of eligible jurors solely because of their race.

There is an inherent tension between the requirement of representativeness in the jury pool and the peremptory challenge. Both are intended to secure an impartial jury. To the extent that the Constitution requires a mix of individual viewpoints on the jury so as to reflect the

community proportionately, however, it appears at least theoretically that peremptory challenges would be correspondingly curtailed. Rather than suggesting that peremptory challenges be eliminated because they can be abused, however, petitioner urges this Court to adopt a remedy which will be the least intrusive restriction on the peremptory challenge.

Toward this end, petitioner suggests that the *Batson* remedy, minus the requirement that the accused be a member of the excluded "cognizable group", is adequate. Given the decision in *Batson*, and the resulting inconsistency in jury selection practice if the same rule is not applied under the Sixth Amendment, this Court should take the short step of applying the rule to the relatively smaller number of cases not covered by *Batson*.

While at first blush there appear to be conceptual problems applying restrictive equal protection concepts of suspect classes in the more expansive context of the Sixth Amendment, petitioner suggests there is ample precedent for doing so. The Sixth Amendment fair cross-section cases themselves grew out of jury representativeness decisions under the equal protection principles. Those cases were spawned by an extensive history of racial discrimination in jury selection. This country's intransigent history of racial discrimination and its corresponding blight on the jury system warrant, as a matter of both public policy and constitutional imperative, application of equal protection principles to selection of an impartial jury under the Sixth Amendment. To prevent the overzealous or biased prosecutor from continuing to undermine years of action by this Court to remedy racially motivated exclusion of blacks from jury service, petitioner urges this Court to hold the Sixth Amendment

bars exclusion of eligible jurors solely because of their race.

I. THE PROSECUTOR'S USE OF PEREMPTORY CHALLENGES TO EXCUSE BLACK PROSPECTIVE JURORS SOLELY ON THE BASIS OF THEIR RACE VIOLATED PETITIONER'S SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY.

The Sixth Amendment to the United States Constitution assures the right to trial by an impartial jury. In a long line of cases this Court has addressed whether the Sixth Amendment prohibited exclusion of blacks, women and other groups from jury pools; whether less than unanimous jury verdicts were violative of the Sixth Amendment; whether six or five person juries were constitutionally permissible. In each of these cases, the result has turned on whether the challenged practice has denied the accused a fair *possibility* of obtaining a representative cross-section of the community on his jury.

In *Williams* v. *Florida*, 399 U.S. 78, at 100 (1970) this Court found a six person jury constitutionally adequate to ". . . provide a fair possibility for obtaining a representative cross-section of the community." In *Ballew* v. *Georgia*, 435 U.S. 223, at 234, 242, 245 it held a five person jury was too small to include an adequate community cross-section:

> ". . . substantial doubt about the ability of juries truly to represent the community as membership decreases below six." (Opinion of Justice Blackmun, writing for the Court, 435 U.S. at 242)
>
> * * *
>
> ". . . a jury of fewer than six persons would fail to represent the sense of the community and hence not satisfy the fair cross-section requirement of the Sixth

and Fourteenth Amendment." (Opinion of Justice White, 435 U.S. at 245.)

In *Apodaca* v. *Oregon*, 406 U.S. 404 (1972) four justices found the less than unanimous jury verdict constitutionally permissible because requirement of unanimity does not materially contribute to the exercise of commonsense judgement which a jury will naturally come to, provided the jury "consists of a group of laymen representative of a cross section of the community . . ." (406 U.S. at 410-411) Again in *Taylor* v. *Louisiana*, 419 U.S. 522 (1975) this Court held the Sixth Amendment prevented exclusion of women from the jury pools:

> "If the fair cross-section rule is to govern the selection of juries, as we have concluded it must, women cannot be systematically excluded from jury panels from which petit juries are drawn." (Justice White, writing for the majority, 419 U.S. at 533)

As the reviewing court found in *McCray* v. *Abrams*, 750 F.2d 1113 (2nd Cir. 1984), the analytical touchstone in each of these cases is whether the challenged practice deprived the accused of a "possibility of a jury that represented a cross section of the community." (*McCray*, at 1125.) If the Sixth Amendment requirement that petit juries be drawn from a fair cross-section of the community is to have more than mere cosmetic meaning, it must require that the petit jury be *fairly* drawn from the venire, without racially motivated exclusion of venirepersons, leaving intact the *possibility* that the jury actually selected will represent a cross-section of the community.

A. The Right To The Fair Possibility For A Representative Cross-Section Of The Community On The Petit Jury Ensures (1) A Commonsense Judgment Of The Community, (2) A Sharing In The Administration Of Justice By All Groups In The Community And (3) Preserved Public Confidence In The Fairness Of The Judicial System.

Believing that the Sixth Amendment right to trial by jury was "fundamental to the American scheme of justice," this Court applied the protection to state criminal defendants through the due process clause of the Fourteenth Amendment in *Duncan* v. *Louisiana*, 391 U.S. 145, 149, 153-4 (1968). In doing so, this Court emphasized that juries operate to protect "against arbitrary rule" (391 U.S. at 151), to "prevent oppression by the Government" (391 U.S. at 155-6), and to guard both "against the corrupt or overzealous prosecutor" and "the compliant, biased or eccentric judge." (391 U.S. at 156) (See also *Williams* v. *Florida*, 399 U.S. 78 (1970) holding the jury a "safeguard against arbitrary law enforcement" (at 87) and quoting *Duncan* (at 100); *Ballew* v. *Georgia*, 435 U.S. 223, 229 (1978) quoting *Williams* and *Duncan*; *Taylor* v. *Louisiana*, 419 U.S. 522, 530 (1975) citing *Duncan*.) Thus, one such purpose of providing for the fair possibility for a representative cross-section of the community on the jury is to ensure the commonsense judgment of society to so protect the accused citizen. (*Lockhart* v. *McCree*, 476 U.S. 162, 174 (1986))

Further, in *Lockhart*, this Court stressed, on the basis of *Taylor*, additional purposes for permitting a community cross-section to serve on the jury: ensuring a sharing in the administration of justice as part of the civic responsibility of all and preserving public confidence in the fairness of the criminal justice system. (476 U.S. 162, 174-5)

This Court must now, to assure as best as legally and humanly possible these endorsed purposes of trial by jury, hold the use of peremptory challenges by a prosecutor to excuse black venirepersons solely on the basis of their race, found to violate the Fourteenth Amendment Equal Protection Clause in *Batson* v. *Kentucky*, also violates the Sixth Amendment right to trial by an impartial jury.

In *Teague* v. *Lane*, 489 U.S. ___ 103 L.Ed.2d 334 (1989), this Court neared approval of a universal constitu-

tional right to a jury from which eligible jurors may not be validly removed by peremptory challenge on the basis of race.

There, four Justices agreed that the accused would suffer a constitutional violation of his right to trial by an impartial jury by State removal on racial grounds by peremptory challenge of blacks eligible for jury service.[1] This Court should now establish that right in this case.

To date, 9 States[2] and 2 federal circuits[3] have recognized a constitutional right to a jury selected in a racially neutral manner in order to achieve the fair possibility it contains a representative cross-section of the community. It is time this Court agreed and proclaimed that right the supreme law of the land.

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[1] No rejection of such a right was announced in *Teague*. Four Justices were suspicious of the nature of the right involved because the test of *Duren* v. *Missouri* was proposed as applicable to the situation of blacks removed by peremptory challenge from the petit jury. (See 103 L.Ed.2d at 350 n 1) Petitioner here does *not* advocate using *Duren* as the standard by which to determine if the State's exclusion of prospective jurors by use of peremptory challenge violates the constitution. Thus, skepticism as expressed in *Teague* on the validity of such a right is unwarranted here.

[2] California: *People* v. *Wheeler*, 148 Cal. Rptr. 890, 583 P.2d 748 (1978); Massachusetts: *Commonwealth* v. *Soares*, 377 Mass. 461, 387 N.E.2d 499 (1979); New Mexico: *State* v. *Crespin*, 94 N.M. 486, 612 P.2d 716 (1980); New Jersey: *State* v. *Gilmore*, 103 N.J., 508, 511 A.2d 1150 (1986); Delaware: *Riley* v. *State*, 496 A.2d 997 (1985); Florida: *State* v. *Neil*, 457 So.2d 481 (1984); Arizona: *State* v. *Superior Court*, 157 Ariz. 541, 760 P.2d 541 (1988); Texas: *Seubert* v. *State*, 749 S.W.2d 585; Colorado: *Fields* v. *People*, 732 P.2d 1145 (1987).

[3] Second Circuit: *McCray* v. *Abrams*, 750 F.2d 1113 *remanded* 92 L.Ed.2d 705 *reconfirmed Roman* v. *Abrams*, 822 F.2d 214 (2d Cir. 1987); Sixth Circuit: *Booker* v. *Jabe*, 775 F.2d 762 *remanded* 92 L.Ed.2d 705 *reinstated* 801 F.2d 871 *cert. denied* 93 L.Ed.2d 860.

1. The Right Ensures A Commonsense Judgment Of The Community.

The essential feature of trial by jury is "the interposition between the accused and his accuser of the commonsense judgment of a group of laymen and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." (*Williams*, 399 U.S. at 100) The American jury is thus a conduit through which the community expresses its sense of justice.

Toward this end, this Court has repeatedly stated that, as a constitutional objective, juries should constitute a truly representative body of a cross-section of the community. (*Taylor*, 419 U.S. 522 at 527 quoting *Smith* v. *Texas*, 311 U.S. 128, 130 (1940); *Ballew*, 435 U.S. 223, 230, 237; *Glasser* v. *United States*, 315 U.S. 60, 85-6 (1942); *Ballard* v. *United States*, 329 U.S. 187, 191 (1946); *Carter* v. *Jury Comm.*, 396 U.S. 320, 330 (1970)) To ensure the fair possibility the petit jury will reflect the judgment of the community by containing cognizable groups, this Court must now insist there be no use by the prosecutor of peremptory challenges in any prosecution to exclude on grounds of race blacks available for jury service.

In the past, this Court has banned obstacles to the inclusion of community groups such as blacks in the roster of eligible jurors. (*Taylor*, 419 U.S. 522; *Duren* v. *Missouri*, 439 U.S. 357 (1979); *Ballard*, 329 U.S. 187) This Court there acted to require cognizable groups be placed on the jury lists in order to assure the fair possibility for eventually obtaining the desired representative community cross-section on the petit jury. (See *Williams*, 399 U.S. at 100.) Thus, in *Taylor* this Court forthrightly declared that the presence of the fair cross-section of the

community on the listings from which trial juries were drawn was essential to fulfilling the constitutional guarantee to a jury trial. But, in reaching this holding, this Court must have been concerned that the exclusion of any distinct group from the venire necessarily precluded its presence on the petit jury. (See *Taylor*, 419 U.S. 522, 538: absence of women from jury lists "operates to exclude them from petit juries, which in our view is contrary to the command of the Sixth and Fourteenth Amendments.") Hence, rather than simply creating the right to a representative venire from which the prosecutor could exclude cognizable groups by peremptory challenge, this Court was endeavoring to assure, as much as legally possible, the fair possibility that petit juries would actually contain cognizable groups comprising the community.

For, it is the petit jury and not the venire which is called upon to express, through desired interaction, the community's decision (*Booker* v. *Jabe*, 775 F.2d 762, 770 (6th Cir. 1985) *remanded* 92 L.Ed.2d 705, *reinstated* 801 F.2d 871 (6th Cir. 1986) *cert. denied* 93 L.Ed.2d 860 (1987); *Commonwealth* v. *Soares*, 377 Mass. 461, 387 N.E.2d 499, 513 (1979)) Since it is thus the petit jury which is expected to act as the voice of society in truly representing the sense of the entire community (*Ballew*, 435 U.S. 241, 242), it does little good to simply assure procedures for a representative venire. It would be meaningless to merely provide for a representative cross-section on the venire from which the jury is selected but then fail to provide for the fair possibility the representative cross-section will reach the petit jury. Just as racially neutral practices are necessary in preparing and selecting the venire, so too racially neutral procedures are necessary in selecting the petit jury.

The prosecutor's use of peremptory challenges to remove cognizable groups such as blacks from the petit

jury would interfere with the racially neutral procedures by which the jury should be selected and would nullify this Court's objectives in creating the representative cross-section rule. This court in *Lockhart* v. *McCree* appreciated that exclusion of group members on grounds unrelated to their ability to serve as jurors "arbitrarily skewed" the juries "in such a way as to deny criminal defendants the benefits of the common-sense judgment of the community." (476 U.S. 162, 175 (1986)) When black potential jurors are unlawfully excluded from the petit jury, the desired interaction among different groups in the community does not occur and the purpose of the jury is thereby frustrated. (See *Ballew*, 435 U.S. at 234: "counterbalancing of various biases is critical to the accurate application of the common sense of the community to the facts of any given case.") Discriminatory use of peremptory challenges to disrupt this needed counterbalancing of views inhibits this essential trial jury activity.

In *Batson* v. *Kentucky*, this Court condemned a procedure by which to deny a defendant the community's judgment when it stressed that "the State may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at 'other stages in the selection process'". (476 U.S. 79, 88 (1986)) To function as the expression of the will of society, the petit jury must contain, as best the system can assure, the broad spectrum of society's representative groups. An accused must be deemed to have the constitutional right under the Sixth Amendment to the fair possibility his petit jury will contain blacks and, thus, a representative cross-section of the community. (See *Williams*, 399 U.S. 78, 100)

In *Peters* v. *Kiff*, this Court declared its unwillingness "to make the assumption that the exclusion of Negroes has relevance only for issues involving race." Rather, it

stressed that removal "from the jury room" of those "qualities of human nature and varieties of human experience" provided by identifiable groups in the community deprived the trial jury of crucial perspectives which "may have unsuspected importance in any case that may be presented." (407 U.S. 493 at 503-4) The purpose of recognizing the right of the accused to an opportunity for his jury to reflect all elements in the community is to avoid the unnecessary loss of that combined community judgment. Without such a constitutional right, there will be no assurance that citizens who rely upon the jury as the trier in their case will receive, as best the judicial system can provide, a trial before a representative cross-section of the community.

2. The Right Ensures A Sharing In The Administration Of Justice By All Groups In The Community.

The second acknowledged purpose of a process which bars interference with the fair possibility community groups may serve on the jury is to implement the belief, held by this Court, that all citizens should share in the administration of criminal justice. (*Lockhart*, 476 U.S. 162 at 175) One such common method of citizen sharing in judicial administration is service on a petit jury. The consequence of restricting such participation, as by removal of groups such as blacks from the petit jury because of their race, is to signify an assumption members of the black community are unfit to function as responsible citizens due to their racial inferiority.

Prosecutorial use of peremptory challenges on racial grounds, no matter the race of the defendant, is directly harmful to the prospective juror excluded from jury service and indirectly harmful to every black member of society because each is thereby told by the State that

blacks lack the qualifications necessary to judge another (in this case, a white person). Removal from the trial jury by peremptory challenge of black citizens on grounds of race, an act thereby stigmatizing the individuals and the class and branding all with the government's stamp of racial inferiority (see *Peters* v. *Kiff*, 407 U.S. 493, 499), must be condemned and forbidden whenever and wherever it occurs.

A partial step towards this end was taken by this Court in *Batson* when it outlawed a prosecutor's use of peremptory challenges to strike blacks from the jury "on the assumption that blacks as a group are unqualified to serve as jurors." (*Batson* v. *Kentucky*, 476 U.S. 79, 97) However, under *Batson*, only black defendants are authorized to contest such racial misuse of the prosecutor's power of juror exclusion. White defendants have no comparable weapon to fight racial bigotry and the war against racial discrimination is thereby crippled. This restriction is certainly detrimental to the black citizens so victimized by continuing racial prejudice and society's ability to combat racial discrimination should not be so limited.

It cannot be just to prohibit State reliance on racial stereotyping in selecting a jury for a black defendant's trial but to sanction that very same prejudice when choosing a jury in the case of a white defendant. The need for remedial action is no less urgent there and the appropriate means for confronting racial discrimination in the selection of the petit jury in such a case is applying the Sixth Amendment.

3. The Right Ensures Preserved Public Confidence In The Fairness Of The Judicial System.

The final purpose for recognizing the right to the fair opportunity for a representative cross-section on the petit

jury is the need to maintain public confidence in the integrity of the community's judicial system. (*Lockhart*, 476 U.S. 162, 174-5)

Impermissible removal of members of a cognizable group such as blacks offends this public interest in the integrity of its judicial process (*Booker*, 775 F.2d 762 at 772) and casts legitimate doubt on the integrity of the whole judicial system. (*Peters*, 407 U.S. 493 at 502; *Rose* v. *Mitchell*, 443 U.S. 545, 555-6 (1979)) "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." The exclusion of blacks on the basis of race "impairs the confidence of the public in the administration of justice" and constitutes an "injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts" (*Rose* v. *Mitchell*, 443 U.S. at 556; quoting from *Ballard* v. *United States*, 329 U.S. 187, 195 (1946))

There can be no image of a fair jury in the eyes of the community if the process of selecting it sanctions discrimination. Juries must both be fair and be recognized as such by the public. Establishing the right to a trial jury selected by procedures which bar the State from excluding black jurors from actual jury service solely because of their race, achieves the objective of preserving public confidence in the fairness of the criminal justice system. Thus, this Court should rule that the petit jury must be selected without invalid governmental interference in the otherwise natural opportunity for cognizable groups to serve on the panel. It is appropriate for this Court to simply bar the government from improperly interfering with the fair possibility that members of distinct groups, in this case blacks, will serve on a trial jury by using its peremptory challenges invalidly to excuse them.

B. The Right To The Fair Possibility For A Representative Cross-Section Of The Community On The Petit Jury Does Not Command That Each Petit Jury Must Mirror The Community.

This Court has repeatedly emphasized the impossibility of guaranteeing each and every petit jury selected throughout the country is actually representative of the community. (*Taylor*, 419 U.S. 522, 538; *Duren*, 439 U.S. 357, 364 n 20; *Lockhart*, 476 U.S. 162, 173-4) Petitioner does not dispute such conclusions and does not quarrel with the assessment he has no right to a petit jury which contains every identifiable group in the community. He does, however, have the right to the fair possibility that such distinct groups will not be blocked from serving on his jury by racially motivated use of the peremptory challenge to exclude black venirepersons from actual jury service.

The obligation of the State is not to locate and seat representative jurors on the petit jury but to avoid illegally unseating those otherwise available for jury service by use of peremptory challenges. While, admittedly, no one is entitled to a petit jury that proportionally reflects all segments of the community, everyone is nevertheless constitutionally entitled to the fair possibility that the jury will approximate as nearly the ideal cross section of the community as the process of random draw permits. (*Soares*, 387 N.E.2d 499, 516; *Wheeler*, 148 Cal.Rptr. 890, 903; *People* v. *Payne*, 106 Ill.App.3d 1034, 1037, 436 N.E.2d 1046 (1982) *reversed* 99 Ill.2d 135, 457 N.E.2d 1202 (1983)) Thus, here, petitioner seeks "not a requirement that petit juries actually chosen must be an exact microcosm of the community, but rather the guarantee that the State's use of peremptory challenges 'may not restrict unreasonably the possibility that the petit jury

will comprise a representative cross section of the community.'" (*Gilmore*, 511 A.2d 1150 at 1160) Any argument to the contrary is simply not persuasive when viewed in light of the fact that petitioner does not argue that he is entitled to a jury of any particular composition.

What petitioner is entitled to is a ban on the State's "active discrimination" to peremptorily excuse blacks from the jury on racial grounds. (*United States* v. *Cecil*, 836 F.2d 1431, 1445 (4th Cir. 1988)) This Court must now condemn the State's resort to discriminatory use of peremptory challenges to do indirectly what it cannot do directly. A government which obeys the dictates of this Court by including cognizable groups in the venire only to frustrate the expectations of this Court and the rights of the accused by removing them from the petit jury mocks the constitution so sacred to our system. It is time for this Court, as it did in *Batson*, to forbid the racial misuse of peremptory challenges to exclude blacks from the jury because such exclusion violates valued Sixth Amendment constitutional safeguards.

C. The Right To The Fair Possibility For A Representative Cross-Section Of The Community On The Petit Jury Will Not Unduly Harm The Use Of State Peremptory Challenges.

As this Court implicitly recognized in *Swain* v. *Alabama*, 380 U.S. 202 (1965), there is an inherent tension between peremptory challenges and the goal of a representative jury. Although this clash may have seemed irreconcilable when *Swain* was decided, this Court in *Batson* v. *Kentucky* held that the peremptory challenge must yield when exercised solely on the basis of race to exclude blacks otherwise qualified to serve as jurors.

The clash between the peremptory challenge and the goal of jury representativeness is equally apparent in the

context of the Sixth Amendment. To effectuate the purpose of achieving a commonsense judgment based upon community participation, this Court has prohibited the exclusion of certain groups from the jury pool. *Taylor; Duren; Castaneda* v. *Partida*, 430 U.S. 482 (1977)) Although these cases stand for the proposition that persons cannot be excluded from jury pools on the basis of membership in a group, the peremptory challenge may be used for just such a purpose. The peremptory challenge, therefore, "by its very nature, operates to exclude individuals and even groups, thus interfering with the chances of obtaining a jury fairly representative of the community." (Doyel, *In Search of a Remedy for the Racially Discriminatory Use of Peremptory Challenges*, 38 Okla. L. Rev. 385, 439 (1985))

The inevitable clash between the right of the accused under the Sixth Amendment to the fair possibility that blacks will reach his petit jury and the prosecutor's use of a peremptory challenge must be resolved as in the *Batson* case. Thus, no undue damage to the State peremptory challenge should result.

This Court observed in *Lockhart* v. *McCree* that strict application of the fair cross-section ideal to the petit jury would likely require the elimination of peremptory challenges. (476 U.S. at 178) In *Batson* v. *Kentucky*, 476 U.S. 79 at 103, 107-8, Marshall, J., concurring, advocated on other grounds abolition of peremptory challenges. Petitioner contends that the racially based exercise of peremptory challenges can be severely curbed if not eliminated without this drastic step.

No intrusion upon the prosecutor's free use of peremptory strikes even arises until the court becomes convinced that defendant has established a prima facie case of racial

discrimination. Only after the prosecutor first intrudes upon the accused's constitutional right to the fair possibility of blacks on his jury is the judge authorized to tamper with the prosecutor's use of his peremptory privilege. Even then, the prosecutor need only explain his challenge on neutral grounds to avoid sanctions. Neither the right nor its enforcement signifies the end of the peremptory challenge as an effective jury selection tool. Rather, they spell the beginning of a more equitable jury selection process.

The peremptory challenge, if properly used, is certainly an essential tool in selecting a fair and impartial jury. No significant damage to its legitimate exercise, as defined in *Batson*, will result from a holding of this Court that prosecutors may not misuse their powers of peremptory challenge to frustrate the fair possibility that blacks will sit on a defendant's jury.

D. To Effectuate The Right To A Fair Possibility For A Representative Cross-Section Of The Community On The Petit Jury, The Standards Of *Batson* v. *Kentucky* Should Be Applied

This Court effectuated the right recognized in *Batson* v. *Kentucky*, 476 U.S. 79 (1986) with a simple procedure for discovering a violation of that right. The same simple standards are applicable for violation of the like right under the Sixth Amendment.

The appropriate procedure, like the method approved in *Batson* (described as a "practical model to follow" (*Seubert* v. *State*, 749 S.W.2d 585, 588 (Tex.App. 1988)), involves two steps in the prima facie case: (a) removal by peremptory challenge of members of a cognizable group and (b) the clear likelihood the members were removed on

the basis of group association.[4] (See *Wheeler*, 583 P.2d 748, 764; *Soares*, 387 N.E.2d 499, 516-17; *McCray* v. *Abrams*, 750 F.2d 1113, 1131-2 (2nd Cir. 1984) *remanded* 92 L.Ed.2d 705 (1986) *reconfirmed Roman* v. *Abrams*, 822 F.2d 214 (2nd Cir. 1987); *Booker*, 775 F.2d 762, 773.)

While this Court has never provided a definition of "distinctive group in the community" whose removal would interfere with a representative cross-section on the jury, it has noted that such a concept must be linked to the purposes of a jury composed of a community's fair cross-section. (*Lockhart*, 476 U.S. at 174) In this regard, blacks involved here, have clearly been recognized as a cognizable group, the removal of which would infringe upon the right to trial by jury. (*Lockhart* v. *McCree*, 476 U.S. 162 at 175; *United States* v. *Hafen*, 726 F.2d 21, 23 (1st Cir. 1984); *United States* v. *Musto*, 540 F.Supp. 346, 354 (D.N.J. 1982); *People* v. *Harris*, 36 Cal.3d 36, 679 P.2d 433, 440-1 (1984); *Soares*, 387 N.E.2d 499, 516.)

The likely removal of the group members on the basis of their membership (in case of blacks, as here, on racial grounds) would, as in *Batson*, be a matter of all the facts and circumstances in the case.

The rebuttal burden on the prosecution in lower courts where blacks have been removed from the petit jury by State peremptory challenge has been simply to show that those challenges were not used on the basis of group affiliation. (*Soares*, 387 N.E.2d 499, 517; *Wheeler*, 583

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[4] Although *Batson* considered an equal protection violation and the constitutional infraction arises here under the Sixth Amendment, the differences should be deemed of "no consequence." (*Lindsey* v. *Smith*, 820 F.2d 1137, 1145-6: facts alleged to be Sixth Amendment infringement same as equal protection violation and rebuttal to either based on same facts)

P.2d 748, 765) Since the State possesses a legitimate interest in validly using its peremptory challenges to remove unqualified jurors, it need only demonstrate racially neutral selection criteria. Therefore, to rebut any prima facie case under the Sixth Amendment, the prosecutor need only show, as under *Batson*, 476 U.S. at 97, 98, use of each challenge on the basis of justifiable criteria unrelated to the race of the stricken juror.[5]

This Court should thus now recognize petitioner's right to a petit jury fairly drawn from the venire without the exclusion of blacks by the State through peremptory challenge because of their race so as to thereby frustrate the fair possibility the jury will contain a representative cross-section of the community. It should equally conclude the standards of *Batson* apply so that, under that procedure, he is entitled to a hearing on the State's misuse of its peremptory challenges to exclude all blacks from his jury.

E. The *Batson* Holding Is Appropriate In the Context Of Sixth Amendment Violations

While essentially an equal protection holding, the application of *Batson* as explained herein in section D is an appropriate solution in the context of Sixth Amendment violations on two grounds.

First, as in *Batson*, the State excluded black prospective jurors here and the *Batson* process is the proper

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[5] This element of *Batson* is also appropriate for determining a Sixth Amendment violation since in discussing in *Batson* the explanation necessary to rebut a prima facie equal protection claim, this Court relied on standards developed in lower courts to judge "rebuttals to sixth amendment fair cross-section challenges to the use of peremptory strikes". (*Lindsey* v. *Smith*, 820 F.2d 1137 at 1146 n 11)

response whatever the race of the accused where blacks are removed. This Court need not determine whether the exclusion of other cognizable groups violates the Sixth Amendment or, if so, what the procedures for raising the error should be.

Second, the adoption of *Batson* procedures to Sixth Amendment situations is sensible under reasoned, persuasive authority. In *Lindsey* v. *Smith*, 820 F.2d 1137 (11th Cir. 1987), the court noted that where, as here, both the Sixth Amendment and equal protection claims and the State's rebuttal are based on the same set of facts, the Sixth Amendment "protection against the exclusion of blacks from his petit jury . . . did so in a way that was inseparable from the corresponding protection accorded him by the equal protection clause." (820 F.2d at 1145)

Furthermore, one commentator has recognized that, although this Court designed the procedures in *Batson* to cure an equal protection violation, it

> "is not incompatible for the same action giving rise to equal protection remedies to have also violated the sixth amendment. In such a case, the equal protection violation justifies the equal protection remedies. The same action, as a sixth amendment violation, justifies the application of those remedies . . . under the sixth amendment." (Note, *Sixth and Fourteenth Amendments—The Swain Song of the Racially Discriminatory Use of Peremptory Challenges*, 77 J. Crim. L. & Criminology 821, 840 (1986))

It has been suggested in another article that references to "large, distinctive groups" and "identifiable segments playing major roles in the community" in *Taylor* were written with respect to groups which could not be excluded in the venire stage. But it was pointed out that at the petit jury selection stage that the fair cross section

rule must be balanced by the competing interests of the peremptory challenge. After observing that the overwhelming evidence of the abuse of peremptory challenges to exclude racial minorities justified use of the fair cross section rule to curb this abuse, it was argued that

> "[u]ntil evidence is developed to establish that jury participation by nonracial groups is being thwarted on a large scale by the use of peremptory challenges, only racial groups should be protected from peremptory exclusion." (Doyel, 38 Okla.L.Rev. 385, 440-1)

In this case, the exclusion of blacks by peremptory challenge was surely as much a Sixth Amendment violation as an equal protection infringement. Consequently, the sound method for determining the infraction discovered in *Batson* should apply in the case of denials, as here, of the Sixth Amendment right.

II. ALTHOUGH PETITIONER IS WHITE, HE NEED NOT BE A MEMBER OF THE EXCLUDED GROUP TO CLAIM CONSTITUTIONAL ERROR AND, SO, HE HAS STANDING TO CHALLENGE AS VIOLATIVE OF THE CONSTITUTIONAL RIGHT TO TRIAL BY IMPARTIAL JURY THE REMOVAL IN HIS CASE OF ALL BLACK PROSPECTIVE JURORS BY STATE PEREMPTORY CHALLENGE.

It has repeatedly been recognized in situations where an allegation arises that the State has deprived the defendant of Sixth Amendment rights by removing group members from jury service that the defendant need not be a member of that group in order to object. (*Duren*, 439 U.S. 357, 359 n 1; *Taylor*, 419 U.S. 522, 526; *Wheeler*, 583 P.2d 748, 764; *Musto*, 540 F.Supp. 346, 351; *United States* v. *Biaggi*, 680 F.Supp. 641, 653 (S.D.N.Y 1988)) In *Peters* v. *Kiff*, 407 U.S. 493, this Court authorized white defendants to complain (under the Fourteenth Amendment due process clause) about systematic exclusion of blacks from their juries. (See *State* v. *Wagster*, 489 So.2d 1299, 1303 (La.App. 1986).) The ability of white defendants to challenge the State's removal of blacks by peremptory exclusion has been recognized by other courts on the basis of this Court's decision in *Peters*. (See *United States* v. *Gometz*, 730 F.2d 475, 478 (7th Cir. 1984); *United States* v. *Clark*, 737 F.2d 679, 681 (7th Cir. 1984); *State* v. *Superior Court*, 760 P.2d 541; *Seubert* v. *State*, 749 S.W.2d 585.) It is likewise appropriate this Court accord to white defendants constitutional standing to argue that exclusion of blacks violates their Sixth Amendment guarantee of right to trial before an impartial jury. White petitioner Holland should thus be permitted to contest at a hearing on remand the State's removal by peremptory challenge of all black prospective jurors by which to thereby interfere with his right to the fair possibility that members of that cognizable group would serve on his jury.

For, the facts here suggest a prima facie case of constitutional violation. The background of both black prospective jurors here, as shown by their responses to the trial judge's inquiries, clearly indicated they were qualified to serve as jurors (J.A. 2-6) No effort was made by the prosecutors to ask additional questions in order to indicate doubt as to eligibility and the State summarily employed its peremptory challenges to remove each of them from the panel. As a result, no blacks were seated on petitioner's petit jury. On this basis, petitioner deserves a hearing in the trial court at which to prove a prima facie case of State interference by means of racially motivated peremptory challenges with the clear possibility a representative cross-section of the community would comprise his trial jury. This Court should therefore now both recognize the Sixth Amendment right to a jury chosen through

a nondiscriminatory process (applicable to petitioner in State court through the due process clause of the Fourteenth Amendment) and apply it to him by setting aside the contrary decision of the Illinois Supreme Court and remanding for a hearing on the State's unconstitutional use of its peremptory challenges.

CONCLUSION

Wherefore, petitioner prays that the judgment of the Illinois Supreme Court be reversed and the cause be remanded with directions that a hearing be conducted on the State's use of its peremptory challenges to exclude blacks from the jury at his trial.

Respectfully submitted,

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No. 88-5080

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In The

Supreme Court of the United States

October Term, 1988

DANIEL HOLLAND,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the right to an impartial jury guaranteed by the Sixth Amendment requires that jurors be selected for the petit jury on the basis of their group membership.

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No. 88-5050

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DANIEL HOLLAND,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR RESPONDENT

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Daniel Holland, who is white, was charged by indictment with rape, deviate sexual assault, aggravated kidnapping, and armed robbery as a result of a May 4, 1980 attack on a 17-year-old white woman. Petitioner was tried in July 1981 in DesPlaines, Illinois, before an all-white jury after a *voir dire* during which the State used two of its ten peremptory challenges against black prospective jurors and eight against whites. Petitioner was found guilty of all charges except aggravated battery. He was thereafter sentenced to imprisonment for a term of 60 years each for rape and deviate sexual assault, 30 years for aggravated kidnapping, and 25 years for armed robbery, all sentences to run concurrently except for the armed robbery sentence which was to be served consecutive to the other terms.

The victim and her boyfriend, both teenagers, were driving home from a party in Schiller Park, a suburb northwest of Chicago, around midnight when they had a flat tire. (R. 807) After discovering that the spare tire was also flat, the couple waited for assistance for over an hour, but no one came. (R. 808) They decided to sleep in the car and slept until dawn, when they began walking to find help. (R. 809-810)

Petitioner stopped his blue Camaro and offered the couple a ride. (R. 811) They accepted, the victim's boyfriend getting in the back seat, the victim sitting in the front passenger seat. (R. 811) Shortly thereafter, petitioner stopped the car, wrapped his arm around the victim, put a knife to her throat and ordered the victim's boyfriend out of the car. Initially, the young man refused, but complied after petitioner threatened to kill the victim. (R.

813-814) Petitioner dragged the victim from her seat and forced her to sit in between the front bucket seats next to him, holding the knife under her arm. (R. 815) Petitioner headed for the tollway as the terrified victim begged him to let her go. (R. 815) Petitioner said he would let her go only when he was through with her. (R. 815)

Petitioner pulled into the parking lot of an apartment complex in DesPlaines, another northwest suburb, and told the victim that if she did not take her clothes off, he would cut her up. (R. 816-818) The victim began to remove her clothes, but petitioner tore off her overalls and underpants and cut her bra with a knife. (R. 819-820) Petitioner forced the victim to perform fellatio upon him. (R. 821) Dissatisfied with the victim's performance, petitioner cut her right thigh with his knife. Petitioner then left the parking lot and began driving around with his penis still in the victim's mouth. (R. 822-823) After about a half hour, petitioner stopped his car again, this time in an alley. (R. 823) At this point, petitioner forced the victim to sit on top of him and have intercourse with him, threatening to kill her if she did not do as he said. (R. 824-826) After penetrating her vagina several times, petitioner then told the victim to get out of the car, and knife in hand, forced her to kneel and perform fellatio upon him as he stood. He then ordered her to get up against the car with her back facing him and once again penetrated her vagina with his penis, this time from behind. (R. 826-828) Petitioner then allowed the victim to get dressed and took about sixty dollars in cash and her school identification card from her before leaving the scene. (R. 805-829)

Petitioner was arrested around 8:00 a.m. that morning, driving the blue Camaro. (R. 24, 28, 33-35, 103-105) The victim's school identification card and a blood-stained knife were recovered from him, as was fifty-eight dollars in

cash. (R. 55-61, 71, 74) That same day, after receiving medical treatment, the victim positively identified petitioner from a photo array and in a line-up. (R. 842-843) Later the same day, petitioner confessed to the rape and armed robbery. (R. 331)

Petitioner elected to be tried by a jury. Petit jury selection procedures in Illinois are governed by statute and by Supreme Court Rules. The statute directs the Jury Commissioners to prepare a list of all voters in the county. Ill. Rev. Stat. 1981, ch. 78, sec. 25. The voter list may be supplemented from the roster of Illinois driver's license holders, but this option is not used in Cook County. In 1981, numerous groups (elected State officials and members of the State Board of Education, judges, clerks of the court, sheriffs, coroners, physicians, Christian Science readers and practitioners, attorneys, ministers, members of religious communities, mayor, aldermen, police and firemen, and those employed on the editorial or mechanical staffs of major newspapers), were exempt from jury service. Ill. Rev. Stat. 1981, ch. 78, sec. 4. The exemption section was repealed entirely in 1987.

In all criminal cases, a jury of twelve must be selected. Ill. Rev. Stat. 1981, ch. 38, sec. 115-4(b). In 1981, the statute provided that the jury must be passed upon and accepted in panels of four. Ill. Rev. Stat. 1981, ch. 78, secs. 21, 23. In 1982, the Illinois Supreme Court promulgated Supreme Court Rule 434(a), which provides that the parties shall pass upon and accept the jury in panels of four commencing with the State, unless the court in its discretion directs otherwise. This has been interpreted as permitting of the trial judge to pick a jury by means other than panels of four. In a case such as this, where imprisonment is a possible penalty, each side is allowed ten peremptory challenges. Ill. Rev. Stat. 1981, ch. 38, sec.

115-4(e). In 1977, the Illinois Supreme Court held that there was no right to attorney *voir dire*; the statute conferring such a right, Ill. Rev. Stat. 1977, ch. 38, sec. 115-4(f), being in conflict with Supreme Court Rule 234. *People v. Jackson*, 69 Ill. 2d 252, 371 N.E.2d 602 (1977). After *Jackson*, attorney *voir dire* was allowed only at the court's discretion.

At petitioner's trial, 40 jurors were examined before a jury of 12, selected in panels of four, was chosen. All initial questioning was conducted by the court. (J.A. 13-14) Fifteen jurors were excused by the court for cause, either health reasons or inability to be fair in a rape case. (R. 528, 551, 601, 618, 629, 633, 637, 655, 661, 668, 680, 697, 700, 740, 743) The defense excused three (R. 521, 750, 760); two of them were questioned by the defense attorney as well as by the court. The State used all ten of its peremptories (R. 528, 531, 565, 615, 615, 632, 677, 683, 706, 718); none of these individuals was questioned except by the court. Two of those excused (Juror Conley, R. 531, and Juror Mosley, R. 565) were black. These were apparently the only two black individuals on the venire.

During *voir dire*, defense counsel raised two distinct issues. First, he argued that his client was entitled to be tried by a representative cross-section of the community, but that out of 40 veniremen, only two were black. As counsel put it, "no blacks are available to a defendant." (J.A. 7-8) He made a request, which was denied, that the trial judge obtain a representative cross-section for the next day's venire. (J.A. 12) Counsel offered no statistics about the racial composition of the pool of registered voters in northern Cook County (including the suburbs north of Chicago), from which DesPlaines venires are drawn, and made no claim that there was anything

improper about the way Cook County jury pools were recruited. He simply requested that the court make an affirmative effort to bring in a venire representative of some unspecified "community." This venire issue was not pressed before either the Illinois Appellate Court (J.A. 19-20), or the Illinois Supreme Court (J.A. 70), and is not at issue now.

Second, trial counsel argued that the State had "systematically excluded", by means of peremptory challenge, the only two blacks on the venire. (J.A. 8) The claim was based on the Sixth Amendment (J.A. 9), and counsel argued that there was no apparent bias on the part of either Ms. Conley or Mr. Mosley to account for their excusal. (J.A. 10-11) When asked by the court to respond, the prosecutor said, "this elimination or this exemption from jury duty by the use of our peremptory challenge, was not based upon their race. That was not the intent of the State in doing so." (J.A. 9) The court pointed out that Mr. Mosley had a friend who had recently been murdered, and that any claim about the individual characteristics of excluded jurors would seem to be irrelevant to a claim of "systematic exclusion." (J.A. 11) The court ultimately denied petitioner's motion based on "the State's response, my observations of the witnesses, the *voir dire* that I conducted," and all the legal arguments. (J.A. 14-15)

On appeal, the Illinois Supreme Court held that petitioner, being white, had no standing under *Batson v. Kentucky* to maintain an equal protection claim (J.A. 70), and rejected the invitation to find that the excusal of black jurors violated petitioner's Sixth Amendment right to a trial by a jury representing a fair cross-section of the community (J.A. 70-71). That is the question now before this Court.

SUMMARY OF ARGUMENT

Petitioner, who is white and was charged with the rape of a white woman, was tried by an all-white jury after eight white and two black prospective jurors were excused by the State. Petitioner now argues that his Sixth Amendment right to a trial by an impartial jury was violated by the excusal of the two black jurors.

Race discrimination is, as petitioner correctly points out, a serious problem that has occupied this society for the past 100 years. However, it is a problem that is the subject matter of the equal protection clause of the Fourteenth Amendment, not the Sixth Amendment, and petitioner explicitly concedes that he lacks standing to bring an equal protection claim, being of a different race than the excluded jurors.

If petitioner, or some future litigant, believes that the standing requirement of the equal protection clause—reconfirmed only three years ago in *Batson v. Kentucky*, 476 U.S. 79 (1986)—is an impediment to full enforcement of the equal protection clause in the context of jury selection, he should challenge the standing requirement directly. He has chosen not to do so. Having made that choice, he may not now recast what is essentially an equal protection claim in the language of the Sixth Amendment (which has no same-race standing requirement) in order to achieve the same result by the back door.

Petitioner's suggested rule—the *Batson* remedy minus standing—is neither a Sixth Amendment nor an equal protection rule. It is a hybrid, with the absence of a standing requirement being the only recognizably Sixth Amendment antecedent. This approach confuses two distinct lines of constitutional jurisprudence, yet petitioner at no point

identifies a discrimination problem that is not adequately handled by *Batson*, nor does he identify a problem cutting to the heart of jury impartiality which is so serious that its remedy justifies the theoretical and practical costs associated with jury selection conducted under a hybrid rule.

In order to adapt the Sixth Amendment—which guarantees only an impartial jury—as a tool to handle supposed discrimination on the petit jury, petitioner takes as his starting point the Sixth Amendment jury pool selection cases, *Taylor v. Louisiana*, 419 U.S. 522 (1975), and *Duren v. Missouri*, 439 U.S. 357 (1979), which hold that the petit jury must be *drawn from* a pool representing a fair cross-section of the community. Petitioner then argues that the petit jury must be "fairly drawn" from the venire, that is, without exclusion on the basis of race, thus extending the fair cross-section requirement from the jury pool to the petit jury. Petitioner suggests that the new Sixth Amendment rule be applicable only when the excluded jurors are members of groups now cognizable under the equal protection clause, and that a *prima facie* case of discrimination be established as under *Batson*, and rebutted only by a showing of a race-neutral reason for exclusion. Thus, petitioner has recreated the *Batson* rule, but without a standing requirement.

Petitioner argues that several State and federal decisions—in particular, *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984), *Booker v. Jabe*, 775 F.2d 762 (6th Cir. 1985), *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499 (1979), and *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748 (1978)—are precedent for extending the fair cross-section requirement from the jury pool to the petit jury. However, each of those cases was decided before *Batson*, and involved a black defendant, a white victim, and an all-white jury; each court crafted a hybrid Sixth Amend-

ment-equal protection rule in order to solve a problem of race discrimination while constrained by the evidentiary burden of *Swain v. Alabama*—which has since been overruled by *Batson*. The rationale of these cases has thus evaporated. Because the instant case involves a white defendant and victim, it presents this Court with the opportunity to decide the pure Sixth Amendment case, unalloyed with overtones of race discrimination.

Respondent submits that petitioner cannot so easily pick and choose his constitutional analysis. If he is basing his claim on the Sixth Amendment, then he must in a consistent fashion apply the internal logic of Sixth Amendment jurisprudence (as set forth in *Taylor v. Louisiana* and *Duren v. Missouri*), unmodified by equal protection concepts. In accordance with these decisions, the claim would apply to the peremptory challenge of members of all distinctive groups in the community (not just racial minorities), and every defendant in every case would have standing to litigate the factual questions of group distinctiveness and systematic exclusion. A *prima facie* case would be rebutted by a showing that the underrepresentation was not "systematic." Discriminatory intent would play no role in a Sixth Amendment analysis.

Such extension of the Sixth Amendment cross-section requirement from the jury pool to the petit jury is unsound, unworkable, and unnecessary. Although petitioner assumes that the reason the jury pool must reflect the community is to provide a "fair possibility" that the petit jury will likewise reflect the community, petitioner ignores the fact that the jury system requires both a petit jury of individuals who are impartial as between the State and the particular defendant, and a broadly-based system of juror recruitment that will confer legitimacy on the criminal justice system and on the institution of trial by

jury. These differing functions and values require different selection processes for the different stages in the system.

Although petitioner disavows any claim that the Sixth Amendment requires the petit jury to contain a representative cross-section of the community, and instead seeks only the "fair possibility" that such will occur, compliance with a Sixth Amendment-based rule regulating peremptory challenges must necessarily be tested by the numbers. Under *Duren v. Missouri*, numerical underrepresentation of some distinct group in comparison with the population must be established. Because each case involves a single petit jury, statistics on jury composition over time are inapplicable, and compliance with, or a violation of, a fair cross-section requirement could be established only by comparing the proportion on the petit jury with the population. Without such a comparison standard, the observation of any particular distribution of groups on a single jury (like the observation of a single coin toss) provides no information about the fairness of the underlying system. Any attempt to substitute "discriminatory intent" for "systematic exclusion" simply collapses the Sixth Amendment analysis into the equal protection clause. Because the proportions cannot be compared until the jury is chosen, a violation would necessarily result in a mistrial (whether or not the jury was actually impartial) and jury selection would start over.

Adoption of such a quota-based standard would require this Court to overrule prior cases which have held unequivocally that "defendant is not entitled to a jury of any particular composition." *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975); *Lockhart v. McCree*, 476 U.S.162, 173 (1986); *Teague v. Lane*, 109 S.Ct. 1060, 1079 n.1 (1989) (Stevens, J., concurring in part). Further, there is an inescapable tension between the peremptory challenge (which

has historically been thought to advance impartiality) and a requirement that petit jurors be members of any particular group. Any claim that a juror be not only impartial but a member of any particular group ("impartial plus") is certainly not addressed by the Sixth Amendment.

In the absence of any evidence that current jury selection procedures lack popular legitimacy, are marred by race discrimination not adequately remedied by the *Batson* decision, or result in petit juries that are not impartial, petitioner's argument that the petit jury must reflect a fair cross-section of the community must be rejected. It is not necessitated by Sixth Amendment jurisprudence, and would result in juries that are selected after vastly more lengthy and costly *voir dires*.

ARGUMENT

I.

A JURY SYSTEM THAT SELECTS IMPARTIAL JURORS FROM A JURY POOL THAT DOES NOT SYSTEMATICALLY EXCLUDE ANY SEGMENT OF THE POPULATION PROVIDES THE IMPARTIAL JURY GUARANTEED BY THE SIXTH AMENDMENT TO EACH INDIVIDUAL ACCUSED, AND PROVIDES LEGITIMACY FOR THE JURY SYSTEM IN THE EYES OF THE COMMUNITY.

A. A Sixth Amendment Approach To Alleged Discrimination Is Unnecessary Given That *Batson v. Kentucky* Is Now The Law.

Petitioner's suggested remedy—the elimination of the standing requirement of the *Batson* decision—is a hybrid derived largely from the equal protection clause, with just

enough admixture from the Sixth Amendment (the supposed source of the remedy) to obviate standing. This hybridization would create a precedent that is unlikely to serve future equal protection or Sixth Amendment jurisprudence well—all to no apparent purpose.

Petitioner starts not with the imperatives of the Sixth Amendment, but from the perspective of a need to eliminate race discrimination—the problem addressed by the equal protection clause. This Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), however, created a remedy that is entirely adequate to deal with discrimination. Of course, it is not available to petitioner, but one may be rightly suspicious of a claim of "race discrimination" when the case involves a white defendant, a white victim and witness, and the exclusion of eight white and two black jurors. Rather, the State "denies a black defendant equal protection of the law when it puts him on trial before a jury from which members of his race have been purposefully excluded." *Batson v. Kentucky*, 476 U.S. at 85, citing *Strauder v. West Virginia*, 100 U.S. 303 (1880). Any class of citizens excluded from jury service could of course file suit to enforce their own rights. *Carter v. Jury Commissioners*, 396 U.S. 320 (1970). The vindication of their rights thus does not turn on the availability of petitioner's services as private attorney general.

Although petitioner argues that there is precedent for grounding group-based jury selection rules in the Sixth Amendment (Brief for Petitioner at 12), he in fact points to no case that is not actually a "discrimination" case in Sixth Amendment guise. Petitioner relies primarily on two state court cases, *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978), and *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499 (1979), and two federal Court of Appeals decisions, *McCray v. Abrams*,

750 F.2d 1113 (2d Cir. 1984), *vacated and remanded*, 478 U.S. 1001 (1986), and *Booker v. Jabe*, 775 F.2d 762 (6th Cir. 1985), *vacated and remanded*, 478 U.S. 1001 (1986), *aff'd on reconsideration*, 801 F.2d 871 (6th Cir. 1986), *cert. denied*, 479 U.S. 1046 (1987). In all four cases, black defendants were accused of crimes against white victims, and were tried by all-white juries (except Soares' jury which had one black juror). In each case the court turned to a Sixth Amendment or a state constitutional ground after finding that a federal equal protection claim—the obvious tool of analysis—was foreclosed by the evidentiary burden of *Swain v. Alabama*, 380 U.S. 202 (1965).

It seems safe to say that none of these opinions would have been written had the *Swain* evidentiary burden been overruled earlier, although the outcomes would certainly have been the same. None of these decisions adopts a full and internally consistent Sixth Amendment approach, and to a greater or lesser extent, each relies on equal protection concepts of suspect classifications, the *prima facie* case, and the theory of rebuttal by means of race-neutral explanations. The State decisions have no same-race standing requirement, but that is attributable to the state constitutions, not the Sixth Amendment, and the federal cases do not address the matter.[1]

[1] Petitioner asserts, Brief for Petitioner at 12 n.2, that seven States in addition to the above-cited jurisdictions have recognized a constitutional right to a petit jury selected to achieve a fair possibility it represents a cross-section of the community. In fact, of the additional seven cases, all the pre-*Batson* decisions are attempts to circumvent *Swain*; each is based at least in part on a State Constitution, each limits cognizable groups to equal protection categories, and each is some mixture of equal protection and Sixth Amendment principles. None follows a pure, internally consistent, Sixth Amendment approach. *See State v. Crespin*, 94 N.M.

(Footnote continued on following page)

Given that *Batson* has now overruled *Swain*, none of these contortions is necessary for a classic discrimination claim. In *Patterson v. McLean Credit Union*, 57 U.S.L.W. 4705, 4709 (1989), which involved a claim readily cognizable under Title VII but brought under 42 U.S.C. § 1981, this Court stated that the fact that discrimination is forbidden by a clearly applicable law "should lessen the temptation for this Court to twist the interpretation of another statute (§ 1981) to cover the same conduct." The availability of one remedy should deter the Court from a "tortuous construction" of another statute in order to provide an alternative remedy. Although *Patterson* involves questions of statutory construction, the reasoning is no less applicable to the interpretation of two provisions of the Constitution. It may be assumed that *Batson* will be applied to any discrimination claim in which black jurors are excused during the trial of a black defendant, and petitioner does not explain why the peremptory challenge of a prospective juror who is of a different race than the defendant, especially when that defendant is white, should be conceptualized as "discrimination" against the defendant.

[1] *continued*

486, 612 P.2d 716 (N.M. Ct. App. 1980); *State v. Neil*, 457 So. 2d 481 (Fla. 1984); *Riley v. State*, 496 A.2d 997 (Del. 1985); *State v. Gilmore*, 103 N.J. 508, 511 A.2d 1150 (N.J. 1986); *Fields v. People*, 732 P.2d 1145 (Colo. 1987); *State v. Superior Court*, 157 Ariz. 541, 760 P.2d 541 (Ariz. 1988); *Seubert v. State*, 749 S.E.2d 585 (Tex. Ct. App. 1988). In the instant case, petitioner mentioned during *voir dire* that Article 1 Section 8 of the Illinois Constitution was similar to the Sixth Amendment (J.A. 10), but the point was not pressed and was not the basis of the trial court's denial of petitioner's motion. Both the Illinois Appellate and Supreme Courts addressed only federal constitutional grounds.

B. The Cross-Section Requirement For The Selection Of The Jury Pool And The Impartiality Requirement For The Selection Of Petit Jurors Complement Each Other, Jointly Producing A Jury System That Has Legitimacy In The Community And Provides An Impartial Jury For The Individual Litigants.

Petitioner and Amicus Curiae argue that because it is the petit jury and not the venire that is called upon to decide a case, it would be "meaningless" to require a representative cross-section on the venire but then fail to provide for the fair possibility that the representative cross-section will reach the petit jury. This is a *non sequitur*. The jury pool and the petit jury are complementary components of the jury system, and each component serves different purposes and values.

The jury pool or venire must be broadly based. This promotes confidence that no segment of the citizenry is excluded from the criminal justice system, and demonstrates that the government does not have the power to "pack" juries with those who may favor its policies; the government can remove people by challenge, but may not affirmatively recruit. "The right to challenge is the right to reject, not to select, a juror." *Hayes v. Missouri*, 120 U.S. 68, 72 (1887). Juries ultimately selected from broadly-based pools will not be the tool of any limited social class. *See e.g., Glasser v. United States*, 315 U.S. 60 (1942) (it would be improper to select women jurors only from a list submitted by the League of Women Voters).

As this Court has often noted, the right to trial by jury is fundamentally a protection against "oppression by the Government." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968); *Williams v. Florida*, 399 U.S. 78, 100 (1970). Contrary to petitioner's assertion, the fair cross-section principle need not be implemented on the petit jury (which

must in any event be impartial) in order for the jury system to act as a shield between State and citizen. Because the prosecutor's decision to investigate or indict must be made long before the trial jury is empaneled, those decisions will be constrained by the knowledge that venires are broadly based. The jury pool also provides jurors for a wide range of civil and criminal litigants, and a broadly based pool of individuals who meet some minimal qualifications is likely to provide jurors that will satisfy the demands of a wide range of cases. Procedural regularity in selection is particularly important given that individual defendants have no role in the recruitment of the jury pools.

In contrast, the individual petit jury must satisfy two particular parties, both of whom, not just defendant, seek the good opinion of the jurors, and hope to remove those most likely to be biased in favor of the opposition. The defendant takes an active role in selecting his petit jury, and his acquiescence to being brought to trial depends in large part on this element of control. At this stage, both parties are looking for the best possible jury that can be empaneled—within the constraints imposed by a randomly chosen venire and a limited supply of peremptory challenges.

Petitioner betrays an attitude more appropriate to jury pool selection when he complains that the two black jurors excused in his case "were qualified to serve as jurors."[2]

[2] Petitioner (Brief at 27) goes on to argue that the prosecutors failed to ask questions of the two black jurors "in order to indicate doubt as to eligibility." The point is apparently an allusion to the statement in *Batson* that "the prosecutor's questions and statements during *voir dire*" are among the circumstances relevant to showing discriminatory purpose. *Batson v. Kentucky*, 476

(Footnote continued on following page)

(Brief for Petitioner at 27) That may or may not be true, but both sides want the "best" of the venire; neither side wants to settle for minimally qualified jurors, and fairness and legitimacy would not be advanced by requiring them to do so. If a rule of excusal only for ineligibility (i.e., for statutory "cause") applied to all jurors, it would, in effect, eliminate the peremptory challenge, traditionally "viewed as one means of assuring the selection of a qualified and unbiased jury." *Batson v. Kentucky*, 476 U.S. 79, 91 (1986), citing *Swain v. Alabama*, 380 U.S. 202, 219 (1965).

If on the other hand, what petitioner means is that black jurors may be excused only for reasons approaching "cause," that is surely an invidious race-based distinction to be making during *voir dire*. Once a black juror qualified for the jury pool, he could be challenged only for reasons articulated on the record (either in open court or in chambers) and acceptable to the judge. No person contemplating jury service is likely to be enthused about the prospect that his personal attributes (inattentiveness, weight, education, grammar, etc.) will be dissected for the record, and any such requirement is certainly discriminatory if applied to blacks only.

[2] *continued*

U.S. 79, 97 (1986). While petitioner notes the absence of questioning of the two black prospective jurors, he does not mention that the prosecutor did not question *any* of the jurors (eight white and two black) who were excused by the State. Since the Illinois Supreme Court's decision in *People v. Jackson*, 69 Ill. 2d 252, 371 N.E.2d 602 (1977), attorney *voir dire* has been relatively unusual. The reference to *Batson* also suggests that an absence of questioning is "discriminatory", which should be irrelevant to a "systematic exclusion" claim.

The legitimacy and impartiality of the jury system is maintained by selection procedures that duly reflect the different demands of the jury pool and the petit jury. A successful institution is not well-served by a misguided attempt to force the particularized petit jury into the mold designed to produce the general-applicability venire. That attempt—in the name of antidiscrimination—to alter the system protected by the Sixth Amendment should be rejected by this Court.

II.

THE EQUAL PROTECTION CLAUSE AND THE SIXTH AMENDMENT PROTECT DIFFERENT INTERESTS AND HAVE DIFFERENT STANDARDS FOR IMPLEMENTATION, AND A PROBLEM RAISED UNDER ONE PROVISION MUST BE TREATED CONSISTENTLY IN ACCORD WITH THE APPROPRIATE STANDARD.

Both the Sixth Amendment and the equal protection clause have lengthy histories, and within each line of case law, standards have been developed for determining whether the constitutional right at issue has or has not been violated. There is an internal logic to each, and standards developed to assess a violation of one may not be freely appropriated for the purpose of establishing a violation of the other, as petitioner is seeking to do. If petitioner wants to apply Sixth Amendment fair cross-section standards to the petit jury, he must follow Sixth Amendment principles consistently to their logical conclusion. To show why the hybridization or at-will borrowing proposed by petitioner is inappropriate and unworkable, it is useful to compare the standards developed by this Court for evaluating claims of equal protection and Sixth Amendment violations.

A. The Core Value Of The Equal Protection Clause Is The Prohibition Against Discriminatory Intent, And The Standard For Establishing And Rebutting A *Prima Facie* Case Is As Set Forth In *Batson v. Kentucky*.

The core value of the equal protection clause found in the Fourteenth Amendment is protection against discriminatory intent on the part of a state actor. "The invidious quality of governmental action claimed to be racially discriminatory 'must ultimately be traced to a racially discriminatory purpose.' " *Batson v. Kentucky*, 476 U.S. 79, 93 (1986), quoting *Washington v. Davis*, 426 U.S. 229, 240 (1976). "Purposeful discrimination" must be proven." *Whitus v. Georgia*, 385 U.S. 545, 550 (1967).

In the context of the jury selection process, exclusion of potential jurors presents an equal protection question if those jurors are members of a racial minority and if defendant is a member of the same group. This same-race standing requirement for defendant reflects his dual status: he is directly the object of invidious discrimination when he is brought to trial by a criminal justice system from which members of his own race have been excluded, and being of the same race is a plausible party to stand in the shoes and enforce the rights of the excluded jurors, who could themselves sue to enforce their right to participation, *see Carter v. Jury Commissioners*, 396 U.S. 320 (1970). (Because petitioner has chosen not to confront standing directly, he does not address either of these theories of equal protection standing or explain how the analysis is altered when there is no congruence between the race of the defendant and those excluded.) Finally, any exclusion must be attributable to discriminatory intent on the part of the government.

These intuitions about the right at issue, and about what must be proved and who has standing to complain, were

implemented by this Court in *Castaneda v. Partida*, 430 U.S. 482 (1977) (involving the selection of grand jurors). Defendant may establish a *prima facie* case of discrimination by showing that a cognizable group, of which defendant must be a member, has been underrepresented over some significant period of time in the context of a selection process that is susceptible of abuse or not racially neutral. 430 U.S. at 494. Once a *prima facie* case of discrimination is established, the burden shifts to the State to show that the underrepresentation is not due to discrimination.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court followed, but modified, the *Castaneda* standard in order to make discrimination in the *voir dire* of a single trial cognizable. Under the modified standard, a *prima facie* case could be established by showing that:

1. Defendant is a member of a cognizable racial group, members of which have been excluded;
2. The selection process is susceptible of abuse; and
3. All the facts and circumstances raise the necessary inference of purposeful discrimination.

476 U.S. at 96. That is, direct evidence of intent obtainable from the face-to-face confrontation between the prospective jurors and the parties may be substituted for the indirect evidence of intent obtainable from a long-term statistical pattern of exclusion. Once a *prima facie* case of discrimination is established, the burden, as under *Castaneda*, shifts to the State to show that the exclusions were not due to discriminatory animus, but are related to the outcome of the trial. Under the *Castaneda/Batson* standard, underrepresentation, however large, is not actionable unless attributable to purposeful discrimination.

B. The Core Value Of The Sixth Amendment Is The Guarantee Of An Impartial Jury, And The Standard For Establishing And Rebutting A *Prima Facie* Case Is As Set Forth In *Duren v. Missouri*.

The core value of the Sixth Amendment is the guarantee of an impartial jury. The guarantee of impartiality has been held to require that the jury pool be selected from a representative cross-section of the community. *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Duren v. Missouri*, 439 U.S. 357 (1979). That is, no "distinctive" community group may be excluded by the State.

The standard for determining whether exclusion from the jury pool has been established was set forth in *Duren v. Missouri*, 439 U.S. 357 (1979), the Sixth Amendment counterpart to *Castaneda v. Partida*, 430 U.S. 482 (1977). To establish a *prima facie* violation of the "drawn from a fair cross-section" requirement, a defendant must establish that:

> 1) The group alleged to have been excluded is a "distinctive" group in the community;
>
> 2) The representation of this group in the pool from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and
>
> 3) This underrepresentation is due to systematic exclusion of the group in the jury selection process.

Duren, 439 U.S. at 364. A *prima facie* case of systematic, or systemic, exclusion (i.e., that due to the operation of the system) may be overcome if the State can establish that "a significant State interest be manifestly and primarily advanced" by those aspects of the system that result in disproportionate exclusion. 439 U.S. at 367-368. Discriminatory animus plays no role in the *Duren* analysis.

As it happens, because the Sixth Amendment jury pool cases have involved underrepresentation that was clearly attributable to the operation of the system, *see Taylor v. Louisiana*, 419 U.S. 522 (1975) (women had to opt in as jurors) and *Duren v. Missouri*, 439 U.S. 357 (1979) (women permitted to opt out), the *prima facie* case has been easily established. It is, however, clear that the critical point is only whether the system does or does not operate to reduce participation by some group; intent (discriminatory animus) has been irrelevant to the *prima facie* case.

Rebuttal of the *prima facie* case appears to be very difficult. Once the State fails in an attempt to show that the apparent underrepresentation of some distinctive group is due to poor census data or merely reflects the operation of some neutral exemption, the State bears a very heavy burden of showing why government interests are served by excluding some distinctive group from the jury pool. The State's interest in permitting women to decline jury service was given very short shrift in *Duren*, 439 U.S. at 357. The greater attention paid in *Taylor* to the same (ultimately unavailing) State interest probably reflects the fact that *Taylor* in effect overruled *Hoyt v. Florida*, 368 U.S. 57 (1961), which had reached the opposite result, only 12 years earlier, when treating a similar situation as an equal protection problem. (The *Taylor—Hoyt* difference also illustrates the pitfalls of constitutional adjudication based on "distinctive groups" rather than the more permanent equal protection categories; any precedent may be vulnerable to rapid social change.)

There is no Sixth Amendment analog to the *Batson* case, applying the concept of systematic or systemic exclusion to the selection of a single petit jury. That, of course, is the question presented by the present case.

C. A Comparison Of The Equal Protection And Sixth Amendment Standards Shows That Petitioner Is Not Making A Sixth Amendment Claim, But Is Simply Asking For The Elimination Of The Same-Race Standing Requirement Of The Equal Protection Clause.

For the first prong of either the *Batson* equal protection test or the *Duren* Sixth Amendment test, it is necessary to show that the excluded jurors are members of a cognizable group. For the equal protection analysis, cognizable groups are those which are historically disadvantaged, such as blacks. Under the Sixth Amendment, it is necessary to show only that those excused are members of a "distinctive group" in the community. While *Taylor* and *Duren* involved the exclusion of women (arguably a cognizable group for equal protection purposes as well, *see Hoyt v. Florida*, 368 U.S. 57 (1961)), this Court has made it clear that a wide range of community groups may be considered "distinctive" for Sixth Amendment purposes. "Communities differ at different times and places. What is a fair cross-section at one time or place is not necessarily a fair cross-section at another time or a different place." *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975). It seems clear enough that groups defined by some immutable characteristic such as race or sex would be "distinctive." At the other end of the spectrum, groups defined only by attitude apparently are not. *See e.g., Lockhart v. McCree*, 476 U.S. 162, 177 (1986) (a group excludable under *Witherspoon v. Illinois*, 391 U.S. 510 (1968) for opposition to the death penalty is not distinctive); *United States v. Gometz*, 730 F.2d 475 (7th Cir. 1984) (claim that low rate of response to jury summons resulted in juries on which anti-authoritarian personalities were underrepresented not cognizable). In between are a range of attributes which are not necessarily observable, and

are under the control of the individual to greater or lesser degree. *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946) (a civil jury case) held that the right to "an impartial jury drawn from a cross-section of the community" requires that there be no "systematic and intentional exclusion" of "economic, social, religious, racial, political and geographic groups of the community." 328 U.S. at 220. The systematic exclusion of those "who work for a daily wage" was prohibited. *Id.* at 222. While sexual orientation has not been raised heretofore, petitioner's Sixth Amendment approach would seem to require that (e.g.) jury selection in San Francisco reflect the substantial portion of the population that is homosexual. Other courts too have acknowledged the potentially limitless scope of Sixth Amendment categories. *See, e.g., Booker v. Jabe*, 775 F.2d 762, 773 (6th Cir. 1985).

There is thus no basis for petitioner's argument, pressed throughout his Brief, that the Sixth Amendment is violated only when a black juror is excused. That is a totally unprincipled approach to Sixth Amendment jurisprudence, and petitioner's suggestion is explicable only in terms of petitioner's objective: elimination of the standing requirement of an essentially equal protection claim. Such an argument is more appropriately addressed to the Congress, or to a State legislature.

While census data would establish population percentages for some categories, an evidentiary hearing would be required in order to determine whether other suggested groups were really "distinctive" in the community. Jurors would have to be questioned carefully in order to uncover membership in groups defined by characteristics that are not immediately apparent. A juror who was less than candid about, e.g., his religion or sexual orientation

could produce a jury that failed to mirror the community. (Of course there are obvious First Amendment problems with a requirement that a potential juror disclose his religion or memberships, *see NAACP v. Alabama*, 357 U.S. 449 (1958).)

The Sixth Amendment and the equal protection clause have distinct purposes and consequently the second and third prongs of the *Duren* and *Batson* tests as well as the first, involve very different standards. A systematic disproportion itself constitutes an infringement of defendant's Sixth Amendment right to a jury pool chosen from a fair cross-section of the community, and any rebuttal is directed to showing overriding government interest in the systematic procedure that results in the disproportion. *See Duren v. Missouri*, 439 U.S. 355, 368 n.26 (1979). In contrast, the *prima facie* case under the equal protection clause requires a showing of discriminatory animus. *Washington v. Davis*, 426 U.S. 229, 240 (1976); *Batson v. Kentucky*, 476 U.S. 79, 93 (1986). A *prima facie* case may then be rebutted by a showing that there was no invidious discriminatory purpose (i.e., that there were race-neutral reasons for the government's actions). *See Castaneda v. Partida*, 430 U.S. 482, 493-95 (1977).

Although some problems can be conceptualized in alternative ways, a problem typically belongs in one category or the other. Thus, for example, the underrepresentation of women on jury pools has been typically viewed as a Sixth Amendment rather than an equal protection issue. Putting aside the matter of standing when a male defendant challenges the exclusion of women, there is clearly no basis for maintaining that any exclusion was designed with invidious intent to bar women from civic participation (the equal protection touchstone). Rather, the policies

examined in *Taylor* (women had to opt in) and *Duren* (women were permitted to opt out)—however patronizing they may seem to a 1980's feminist sensibility—in context were viewed as benefiting the women who cared for children, and advancing a State interest in promoting the family.

In contrast, venire cases involving the exclusion of black jurors have been brought almost exclusively under the equal protection clause. In part this may simply reflect the pre-1968 unavailability of the Sixth Amendment, *see Duncan v. Louisiana*, 391 U.S. 145 (1968), but more important, discriminatory animus is likely to be the only explanation for the wholesale exclusion of blacks from the jury pools, and unlike the governmental interest in permitting homemakers to stay home, there is no rational government interest in eliminating all black jurors from jury service.

It is thus clear that the Sixth Amendment and the equal protection clause address different problems and have different standards of proof. Lines of case law construing the two provisions of the constitution have developed independently. If petitioner is making a claim under the Sixth Amendment, he must follow Sixth Amendment jurisprudence consistently without modification by equal protection principles.

III.

A SIXTH AMENDMENT RULE THAT REQUIRES A PETIT JURY ON WHICH JUROR GROUP AFFILIATION IS RELEVANT IS UNWORKABLE, AND WOULD RESULT IN A GREATLY INCREASED SOCIAL COST IN EXCHANGE FOR NO GAIN IN IMPARTIALITY.

A. An Extension Of The "Fair Cross-Section" Requirement Of The Sixth Amendment From The Jury Pool To The Petit Jury Necessarily Imports A Requirement That The Petit Jury As Empaneled Actually Mirror The Composition Of The Community.

Petitioner bases his "fair cross-section" claim on two lines of case law which have used the phrase. These are the jury pool selection cases (*Taylor v. Louisiana*, 419 U.S. 522, 528 (1975); *Duren v. Missouri*, 439 U.S. 357 (1979)) which held that juries must be selected *from* a pool that represents a fair cross-section of the community, and the jury size/unanimity cases (*Williams v. Florida*, 399 U.S. 78 (1970); *Ballew v. Georgia*, 435 U.S. 223 (1978); *Burch v. Louisiana*, 441 U.S. 130 (1979); *Apodaca v. Oregon*, 406 U.S. 404 (1972)) which, *inter alia*, mentioned the impossibility of achieving a cross-section of the community on a petit jury of fewer than six unanimous individuals.

The jury pool cases unambiguously held that no community group could be excluded from the pool. The jury size cases—the only cases to use the term "fair cross-section" in the context of the petit jury—did not hold the cross-section requirement applicable to the petit jury. Rather, the possibility of a cross-section was listed as one of several rationales (others included the likelihood that several jurors collectively would remember the testimony when note-taking was not permitted) for not reducing the size of the petit jury below six. At bottom, the point was

merely that a "jury" is a collective body, and if reduced below some minimal size it no longer functions as a "group." *Ballew* and *Williams* are more about group dynamics as a function of group size than about broad-based community involvement being a necessary ingredient of impartiality.

Petitioner argues that he seeks nothing more than the "fair possibility" that his petit jury mirrors the community. "Fair possibility" is a meaningful concept at the jury pool or venire level; as long as no community group is systematically excluded from the jury pool, it is a truism that the "possibility" of a fair cross-section of the community on the petit jury remains intact. Enforcement of the "fair possibility" at the level of the jury pool is a simple matter; it is easy to observe whether the jury pool in some jurisdiction over some timespan does or does not approximate the population distribution of (e.g.) men and women. Petitioner, however, is asking to have the "fair possibility" enforced at the level of the petit jury as well, and the cases offer no obvious guide to implementation.

None of the above cases dealt with the petit jury *per se*, or had occasion to consider what would happen if the "fair possibility" either did or did not ripen into an actuality, or even how the judge or the parties might determine whether such had occurred. A "fair possibility" (a concept even more ephemeral than the "flavor" identified in *Taylor v. Louisiana*, 419 U.S. 522, 532 (1975)) must be made operational if it is to be enforceable. To determine whether the accused's Sixth Amendment right to an impartial jury has been violated, or whether a prosecutor has complied with the law, there must be observable real world events that can be identified by the parties, the trial judge, and any court of review.

Although petitioner disavows any interest in a quota system,[3] he is simply incorrect in asserting that a "fair possibility" can be operationalized without resort to numbers when the problem is viewed consistently as a Sixth Amendment issue. The Sixth Amendment cases have been clear and unambiguous in applying the *Duren v. Missouri*, 439 U.S. 357, 364 (1979), standard for establishing and rebutting a *prima facie* case, yet petitioner, despite explicitly arguing a Sixth Amendment claim, simply announces that he "does *not* advocate using *Duren* as the standard by which to determine if the State's exclusion of prospective jurors by use of peremptory challenge violates the constitution." (Brief for Petitioner at 12 n.1 (emphasis in original).) Petitioner fails utterly to explain why he considers the conventional Sixth Amendment standard inapplicable. Petitioner simply asserts that the *Batson* standard (i.e., the equal protection standard)—minus standing—is "adequate." (Brief for Petitioner at 8.)

Petitioner is apparently following the Second and Sixth Circuits in *McCray v. Abrams*, 750 F.2d 1113, 1131 (2d Cir. 1984), and *Booker v. Jabe*, 775 F.2d 762, 773 (6th Cir. 1985), both of which took a slightly more analytical, although no less cavalier, approach to the *Duren* test, finding the second prong inapplicable to the petit jury, and recasting the third *Duren* prong as "a substantial likelihood that challenges were made on the basis of group affiliation." The resulting "adaptation" of *Duren* is indistinguishable from the *Batson* equal protection test. Rather than finding that the test is wrong when the usual Sixth Amendment analysis is "inapplicable" to a supposed Sixth Amendment violation, one may more sensibly turn the question around and ask whether the situation really implicates the Sixth Amendment at all. Petitioner cannot at will opt out of inconvenient aspects of Sixth Amendment jurisprudence. Because curbing "discrimination" is no part of the core guarantee of the Sixth Amendment, the Sixth Amendment has relevance to the selection of the petit jury (or the venire) only to the extent that "systematic exclusion" (the third prong of *Duren*) produces a biased jury.

[3] Petitioner does not explain why he is willing to settle for a "possibility" rather than demanding a quota when he considers the issue so vital as to justify dismantling large segments of equal protection and Sixth Amendment jurisprudence in order to build a new hybrid rule for this purpose alone. Apparently, petitioner concedes that a petit jury which does not mirror the community can still meet Sixth Amendment standards of impartiality.

Systematic exclusion must be determined by reference to the numbers, as in *Duren* by a showing that women were underrepresented in the jury pool "not just occasionally but in every weekly venire for a period of nearly a year." 439 U.S. at 366. However, petitioner seeks to find a Sixth Amendment violation within the confines of a single trial. To do so, he is attempting to substitute "discriminatory exclusion" (the improper motive of the equal protection clause) for "systematic exclusion."

Some such substitution must be made in order to impart some constitutional significance to the composition of the petit jury. Otherwise, petitioner is left with the bare factual observation that 10 individuals, two black and eight white, were excused by the prosecution, an observation devoid of constitutional significance unless it can be placed in a context of either racial animus (in which case it implicates the equal protection clause either via defendant's right or the excluded individuals' civil rights, *see Carter v. Jury Commissioner*, 396 U.S. 320 (1970)), or a pattern of exclusion that is nondiscriminatory, but "systematic", thus implicating the Sixth Amendment. (For

the same reason, the out-come of a single coin toss conveys no information about whether the coin is a fair one.) In this case, the prosecutor specifically stated at trial that the excusal of the two black jurors was not on account of race, and the trial judge made no finding to the contrary, in fact basing his denial of petitioner's motion in part on the State's response.

If promoting impartiality rather than addressing some imagined discriminatory action is petitioner's true purpose, then he cannot make the equal protection substitution for the third prong of *Duren*, and neither may he dismiss the second prong as inapplicable. He must instead apply *Duren* to the jury empaneled in his case. Petitioner cannot avoid the problem of enforcing a "fair possibility" by saying he will enforce "discriminatory" challenges instead. That collapses the Sixth Amendment into the equal protection clause and the "fair possibility" ceases to have any independent significance. There is only one way to be sure that there has been compliance with the cross-sectional requirement: that is to have a cross-section actually present on each petit jury. Then petitioner can have confidence that there has been no Sixth Amendment violation, and the prosecutor can have confidence that the conviction will not be overturned.

This Court, however, has never suggested that a defendant has a right to a petit jury of any particular composition, and indeed has made it quite clear that there is no such entitlement. *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975); *Lockhart v. McCree*, 476 U.S. 162, 173 (1986). And, in a related context, this Court has recently reiterated its concern that a remedy for discrimination not lead to the imposition of numerical quotas. *Wards Cove Packing Co., Inc. v. Atonio*, 57 U.S.L.W. 4583, 4586 (1989) (Title VII disparate impact employment case). Even if

there were a right to some quota, there are obvious practical obstacles to implementing a cross-section on the petit jury. As this Court observed in *Lockhart v. McCree*, 476 U.S. at 178, "if it were true that the Constitution required a certain mix of individual viewpoints on the jury, then trial judges would be required to undertake the Sisyphean task of 'balancing' juries, making sure that each contains the proper number of Democrats and Republicans, young persons and old persons, white-collar executives and blue-collar laborers, and so on."[4]

With any distribution other than a representative cross-section, and with neither racial animus nor a pattern of

[4] The grand jury cases, although analyzed under the equal protection clause rather than the Sixth Amendment, provide a useful perspective on the idea of empaneling a cross-section. The grand jury involves a small defined group that makes a decision about defendant's own case (like the petit jury) but has to have general applicability for many different cases and is chosen without the participation of the defendant (like the jury pool). On the grand jury there is no tension with peremptory challenges to prevent the selection of each grand jury in a way that will mirror the distribution of cognizable groups in the community. Yet, this Court has never imposed a requirement that the individual grand jury be racially balanced, and the cases have all focused on whether, over some period of time, the selection process produces a pool of grand jurors approximating the community. *See e.g., Alexander v. Louisiana*, 405 U.S. 625 (1972) (*prima facie* case found; population 21% black, grand jury venire 5% black, no blacks on grand jury that indicted); *Arnold v. North Carolina*, 376 U.S. 773 (1964) (in 24 years, only one black served on a grand jury); *Reece v. Georgia*, 350 U.S. 85 (1955) (no black had served in 18 years). The composition of the individual grand juries that indicted these defendants was not decisive; it was merely illustrative of systematic exclusion. Indeed, in *Castaneda v. Partida*, 430 U.S. 482 (1977), the fact that five out of the 12 grand jurors who indicted Rodrigo Partida were Spanish-surnamed was treated as essentially irrelevant given that over an 11-year period, only 39% of the grand jurors were Mexican-American despite a county-wide population of 79.1%.

systematic exclusion across trials to provide context, one would be absolutely at a loss to tell whether any discrepancy is due to chance or to some undetected and undetectable violation of the fair cross-section requirement. Trial judges would have no basis for ruling during *voir dire*, and the composition of the jury would be second-guessed on appeal in order to determine whether a "possibility" had remained intact. (In contrast, the *Batson* equal protection analysis can be usefully applied in the context of a single trial; it is perfectly meaningful to inquire whether an individual juror has likely been excused due to racial animosity, and either possible answer is intelligible.)

Because the venire mediates between the jury pool and the petit jury, a fair cross-section of the community would be hard to empanel without a venire that also represented the community. Of course a different set of problems is generated if the State must affirmatively take steps to ensure that a defendant's venire reflects the community (a claim that petitioner made during his *voir dire* in 1981 (J.A. 7-8)), in order that a jury reflecting the community may be empaneled. A serious potential for divisiveness in the jury assembly room ("You ten Hispanics report to that courtroom"), not to mention manipulation, would arise. Certainly community confidence that jurors are randomly assigned to venires is a major component of the community perception of fairness, impartiality, and legitimacy.

The choices then, if the fair cross-section requirement of the jury pool cases is applied to the petit jury, are a representative petit jury with all the problems that entails, or one that is unrepresentative and in constitutional limbo. The former is unworkable; the latter is meaningless.

When an analysis generates absurd results, it is an indication that the analysis is wrongly applied. Thus, it is respondent's position that the fair cross-section requirement of the jury pool cannot sensibly be applied to the petit jury.

B. Because A Sixth Amendment Analysis Requires That Alleged Underrepresentation Of A Group Be Compared With The Population, The Comparison Cannot Be Made Until 12 Jurors Are Selected, At Which Time The Only Remedy For A Sixth Amendment Violation, Absent A Harmless Error Analysis, Is A Mistrial.

The *Batson* rule addresses discriminatory choices exercised against individual minority jurors. The trial judge and the parties can observe a pattern of strikes developing, and can evaluate the likelihood that the choices are inexplicable except on the hypothesis of discriminatory intent. A "mid-course correction" can be made by the trial judge ("experienced in supervising *voir dire*," *see Batson* 476 U.S. at 97), admonishing the offending attorney or making inquiries. *Voir dire* under *Batson* can be a fluid process, and only in extreme circumstances would a mistrial be necessary.

In contrast, because a Sixth Amendment approach to jury selection has nothing to do with discriminatory intent, individual peremptory challenges are without significance. Only when the entire jury is empaneled is it possible to count the numbers of each "distinctive group," to determine, in accord with *Duren v. Missouri*, whether any group is underrepresented. Thus as jury selection proceeds, the prosecutor will have no way of knowing whether his choice will turn out to violate the constitution. ("Have I chosen too few women, or blacks? Too many?") There is obviously a theoretical problem if the constitutionality of a peremptory challenge depends on the fortuity of who

appears for jury duty that day, and on the order in which the jurors are examined. If the prosecutor has guessed wrong, and the numbers do not match, he is faced with a mistrial at the end of *voir dire*. If a category is oversubscribed after the first panel of four is selected (if, for example, the voting pool in some jurisdiction were 25% black, four blacks would be too many, presaging an underrepresention of some other group), then the remainder of the *voir dire* would be a charade. If (e.g.) the prosecution removed the fifth or sixth black juror on account of his race in order to produce a representative cross-section, he would simultaneously be violating the equal protection mandate of *Batson*. None of this is likely to prove edifying for the citizens who reported for jury duty that day.

The obvious alternative to a mistrial is a harmless error analysis, an alternative thus far rejected in Sixth Amendment jury pool cases, although in general permitted in Sixth Amendment cases, *see Satterwhite v. Texas*, 108 S.Ct. 1792 (1988). If a given procedure is found to "systematically exclude" any distinctive group from the jury pool, that has been the end of the inquiry and the conviction is reversed. As Rehnquist, J., dissenting in *Taylor v. Louisiana*, 419 U.S. 522, 538-39 (1975), pointed out, a finding of a Sixth Amendment venire violation leads to a reversal "without a suggestion, much less a showing, that the appellant has been unfairly treated or prejudiced in any way by the manner in which his jury was selected." *See also Ballard v. United States*, 329 U.S. 187, 194 (1946) (the exclusion of women on a federal jury "may not in a given case make an iota of difference"). In part this draconian result is tolerable because "systematic exclusion" for Sixth Amendment purposes, as heretofore dealt with in the case law, operates at the level of the "system" or mechanism of juror recruitment for the jury pools. Therefore, a single court decision is enough to alter the

juror recruitment system for all time; a jurisdiction only needs to be informed that it must recruit jurors by some mechanism whose operation does not have the effect of systematically excluding any identifiable segment of the community. It is now typical, as in Illinois, to select jurors from voting lists, thus obviating any possibility of systematic exclusion of those who are otherwise qualified. With such juror recruitment schemes in effect throughout the country, it is not surprising that jury pool selection has essentially vanished as a subject of litigation. A problem has been solved by enforcing a rule of procedural regularity in jury pool recruitment.

In contrast, if the Sixth Amendment is applied to regulate group representation at the level of the petit jury (whether allegedly enforcing a "fair possibility" or a quota system), a single court decision can have no such clarifying effect. Any given appellate decision holding (e.g.) that a given jury was insufficiently representative of the community is simply a one-shot decision. It does not "solve" any problem with the operation of the criminal justice system because it does not deal with any systematic or systemic procedures; it deals with and can address only individual human choices. That is, the Sixth Amendment in the context of the jury pool addresses procedural regularity, while in the context of the petit jury it addresses the ends achieved. There can be no "progress" over time as there has been in the jury pool context. The representativeness of the petit jury can and will be litigated afresh in every single trial.

For this reason, it is vital that if the representativeness of the petit jury (rather than the jury pool) is to be challenged, there be an inquiry into whether the exclusion of a juror identifiable with some group really results in greater partiality on the empaneled jury. Otherwise, a

mistrial is granted or a conviction reversed when there is nothing to be "improved" at a new trial, there being no discriminatory animus or actual partiality involved. A reversal is thus a pure windfall for the defendant, at great cost and no counterbalancing gain for society. While this approach might be termed a "harmless error" analysis, that is actually somewhat of a misnomer. The Sixth Amendment requires only "impartiality," and if the empaneled jury is impartial, there is no error, harmless or otherwise. The point, however denominated, is that if the petit jury cannot be shown to be other than impartial, the Sixth Amendment does not permit the jury to be invalidated on account of its group composition. It cannot be argued that it is constitutionally imperative to have an equally impartial jury of a different racial composition. Whatever social policy that might be thought to advance, it certainly has nothing to do with the Sixth Amendment.

C. If The Impartiality Clause Of The Sixth Amendment Is Interpreted To Require A Petit Jury On Which Juror Group Affiliation Is Relevant, Then Every Defendant Would Have Standing To Litigate The Composition Of His Petit Jury.

In his Argument II, petitioner argues that a white defendant should have standing to object to the exclusion of black potential jurors. Respondent maintains that petitioner's remedy—the *Batson* remedy minus a standing requirement—is rooted in neither the equal protection clause nor the Sixth Amendment and is neither permitted nor required by either. The only possible rationale for extending equal protection standing (under the guise of the Sixth Amendment) to a white defendant is, as petitioner argues, Brief for Petitioner at 17, that while black defendants can act as private attorneys general "to correct . . .

racial misuse" of peremptory challenges, "white defendants have no comparable weapon to fight racial bigotry and the war against racial discrimination is thereby crippled." That is, petitioner is making an equal protection policy argument—not traceable to, let alone rooted in, the Sixth Amendment—that every defendant should be able to act as an enforcer of the Reconstruction Amendments. Petitioner does not cite any support for this novel theory of standing, *see* Brilmayer, L., *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 Harv. L. Rev. 297 (1979), and whatever its merits, it is certainly far afield from any concern for impartiality, the ostensible rationale for his Sixth Amendment claim.

If respondent's position is adopted, the standing issue does not arise. If, however, this Court adopts petitioner's argument that the "impartiality" of the petit jury is determined and measured by the group affiliation of the empaneled jurors, then the full logic of the Sixth Amendment requires that every single defendant have standing to complain. While the equal protection clause was directed toward disadvantaged groups, the Sixth Amendment, adopted in 1789, clearly applied to each and every defendant brought to trial in the federal courts. While it is debatable whether *all* the attributes of the Sixth Amendment right to a jury trial have been made applicable to the states via the Fourteenth (*see Duncan v. Louisiana*, 391 U.S. 145 (1968)), it has never previously been suggested that the incorporated provisions apply only to one class of citizens—i.e., those singled out for unique protection by the equal protection clause.

Therefore, if the full force and internal logic of the Sixth Amendment—unaltered by equal protection concepts—is to be applied, there would be no standing requirement, and every defendant, in every trial, would be entitled to

litigate the factual question of whether his petit jury reflects all distinctive community groups—whether those groups be identifiable by race, religion, sex, occupation, ethnic origin, sexual orientation or other distinctive attribute.

D. If The Sixth Amendment Guarantee Of An Impartial Jury Is Interpreted To Bar The Peremptory Challenge Of Prospective Jurors Who Are Identifiable By Group Affiliation, That Bar Must Be Equally Applicable To Prosecution And Defense Because A One-Sided Bar Would Necessarily Produce A Less Impartial Jury.

Throughout his brief, petitioner argues that the Sixth Amendment constrains "the prosecutor" or "the State" in the exercise of peremptory challenges, but petitioner says nothing about whether defendant is constrained as well. That is the question expressly left open by this Court in *Batson v. Kentucky*, 476 U.S. 79, 89 n.12 (1986): "We express no view on whether the Constitution [clause unspecified] imposes any limit on the exercise of peremptory challenges by defense counsel." While the language of the equal protection clause is directed against the government (although there is arguably state action when the court excuses those peremptorily challenged by the defense), the structure of the Sixth Amendment appears to impart symmetry. The Sixth Amendment provides that "the accused shall enjoy" the right to a trial by an impartial jury, but it does not say how impartiality is to be achieved. The provisions of the Bill of Rights were adopted as restraints on the federal government, and through incorporation via the Fourteenth Amendment, now serve to bind the States as well. Thus, it is clear that whatever it is that the Sixth Amendment means by "impartiality," it bars the State from creating a biased jury. The question, then, is whether the Sixth Amendment also bars a defendant from exercising peremptory challenges that create a biased jury.

In general, a defendant can waive a constitutional right, but waiving the right to an impartial jury must mean acceptance of a jury more favorable to the State—although it is a little difficult to imagine what such a waiver would mean in practice.[5] But, it is not meaningful to say that a defendant could waive impartiality and instead "accept" a jury partial to him.

The accused is entitled to an impartial jury, nothing less, but surely nothing more. If the accused is allowed to exercise group-based peremptory challenges and the State is not, then the resulting jury would not be impartial; it would be biased in favor of the defense. This assumes that group-based challenges have an impact on impartiality, an assumption that petitioner urges here, and an assumption that must be accepted in order for this Court to hold that the Sixth Amendment restricts the State's peremptory challenges. If the State is restricted, then the defense must be restricted in the same manner or the resulting jury will by definition be less impartial than under present law. The suggestion that the defense would exercise peremptory challenges in a group-based fashion is not fanciful. The *voir dire* reported in *Booker v. Jabe*, 775 F.2d 762, 764 (6th Cir. 1985), is only an unusually blatant example of a common occurrence—a black defendant systematically removing white jurors. Such conduct by the accused cannot be protected by a constitutional provision guaranteeing his right to an "impartial" jury.

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[5] Waiver of trial by jury in favor of a bench trial—a right which in Illinois is exclusively the defendant's, *see People ex rel. Daley v. Joyce*, 126 Ill. 2d 209, 533 N.E.2d 873 (1989)—is a different matter, having nothing to do with waiving impartiality.

As this Court has noted before, systematic exclusion does not injure the defendant alone. "There is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard v. United States*, 329 U.S. 187, 195 (1946). In *Wheat v. United States*, 108 S.Ct. 1692 (1988), this Court held that the principle of a fair trial for the State could even overcome a matter as fundamental as defendant's choice of counsel. If a symmetrical interpretation of the Sixth Amendment is not adopted, then the increased partiality that would result from the asymmetrical rule urged by petitioner provides an additional reason why this Court should reject petitioner's interpretation of the Sixth Amendment; the Sixth Amendment, which by its terms guarantees only "impartiality" cannot sensibly be held to mandate a procedure that necessarily increases the risk that biased jurors will be empaneled.

There are also insurmountable practical problems if the State is directed to produce a cross-sectionally balanced petit jury while the accused is simultaneously engaged in removing jurors of (e.g.) the victim's race. How is the ideal of community proportional representation to be tested? By the distribution in the county? On the jury pool that month? On the venire sent to the courtroom that day? On the venire remaining after the defense has removed members of the victim's ethnic group? This uncertainty, coupled with the problem that compliance with a fair cross-section requirement must be tested by the numbers at the end of *voir dire*, would seem to make jury selection (a lengthy process under current law) a near impossibility.

IV.

THE "IMPARTIALITY" GUARANTEE OF THE SIXTH AMENDMENT REQUIRES A JURY OF INDIVIDUALS WHO ARE "INDIFFERENT" BETWEEN PROSECUTION AND DEFENSE, AND IS INCOMPATIBLE WITH A REQUIREMENT THAT THESE JURORS BE OF ANY PARTICULAR GROUP AFFILIATION.

Even if petitioner is prepared to follow a consistent Sixth Amendment analysis, with all the practical problems that entails, a Sixth Amendment rule regulating selection of the petit jury on the basis of the group affiliation of the prospective jurors still may not be imposed on the States unless it can be shown that absent such a rule, the States are in violation of the Sixth Amendment. This, petitioner cannot show. The Sixth Amendment speaks only of the right to an "impartial" jury, and petitioner has failed to show any connection between "impartiality" and juror group affiliation. In fact petitioner is unusual in equating representativeness and impartiality.[6] Even petitioner Batson, whose claim was based only upon the Sixth Amendment, argued that the excusal of black prospective jurors from his venire violated his rights "to an impartial jury *and* to a jury drawn from a cross-section of the community." *Batson v. Kentucky*, 476 U.S. 79, 84 n.4 (1986) (emphasis added).

Although not otherwise defined in the Constitution, the term "impartial" has a clear dictionary and decision theory

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[6] It is the equating of the two that creates the tension perceived by petitioner between the peremptory challenge and the cross-sectional requirement. A conflict arises only if representiveness is required on the petit jury and is viewed as an end in itself rather than as a component of a jury selection system whose only touchstone is impartiality. Neither should the peremptory challenge be viewed as an end in itself; it is only a tool for obtaining impartiality.

meaning, which has been explicated in numerous decisions by this Court. *See, e.g., Irvin v. Dowd*, 366 U.S. 717 (1961) (jury demonstrably partial when 8 out of 12 jurors, influenced by pre-trial publicity, had expressed a belief in the defendant's guilt). Despite the absence of any uncertainty over the meaning of "impartial", petitioner argues that impartiality must now be redefined to be linked with group membership, i.e., that the Sixth Amendment prohibits the excusal of jurors identifiable by group membership. Consider the argument in the context of petitioner's own trial. Petitioner must be saying: "I want two impartial jurors who are also black." But, the Sixth Amendment entitles petitioner only to impartial jurors, not to jurors who are "impartial plus," so the Sixth Amendment is not implicated. If what petitioner means is that the prosecution may not excuse two impartial jurors (in favor of two other impartial jurors) because of the fact that they are black (and such did not occur in this case), then petitioner is making an equal protection, not a Sixth Amendment claim, and being white he has no standing to raise the issue. Of course if the two jurors are not impartial, then neither the Sixth Amendment nor the equal protection clause is implicated. And, if 12 impartial jurors are selected, then the accused has the jury promised by the Sixth Amendment regardless of the group affiliation of those included and excluded. In the race discrimination context, of course, it has been held to be an insufficient answer that all the white jurors were impartial,[7] but that

[7] This Court in *Allen v. Hardy*, 478 U.S. 255, 259 (1986), stated that the *Batson* rule, which "ensures that States do not discriminate against citizens who are summoned to sit in judgment against a member of their own race and strengthens public confidence in the administration of justice," had only "some bearing" on the truthfinding function of the jury trial.

reflects the weight of the deeply held social values of the equal protection clause. The "flavors" and "possibilities" that are a derivative value of the Sixth Amendment cannot very well outweigh the "impartiality" that is the only expressed mandate of the Sixth Amendment.

A variant on petitioner's impartiality argument was suggested by Justice Stevens, dissenting in *Teague v. Lane*, 109 S.Ct. 1060, 1079 n.1 (1989), who asserted that the Sixth Amendment conferred upon the accused a "right to have his petit jury selected by procedures that are 'impartial'." It should first be noted that fairness in selection is an equal protection concept; it refers to the subjective purpose of the decision maker, rather than to the outcome promised by the Sixth Amendment. More important, there is no necessary correspondence between an impartial procedure and an impartial end result; an impartial procedure may or may not result in an impartial jury. For example, the selection of the members of the jury pool who are to report to the courthouse on any given day is pre-determined according to some impartial system, and the members of the day's pool sent as a venire to a courtroom are typically drawn either at random or in accord with some non-random but unbiased means. Such procedures are widely viewed as fair and impartial and not susceptible of manipulation, but are quite likely to result in a venire populated with a wide range of viewpoints and biases. In fact, the more broad-based the jury pool, the greater is the likelihood that extremes of opinion will appear on the venires. The broader the jury pool in terms of attitudes sampled, the more necessary is the peremptory challenge; impartiality on the petit jury cannot be achieved unless biases are eliminated, and the peremptory challenge of those perceived to be biased has long been recognized as necessary to obtaining an impartial

jury. *Hayes v. Missouri*, 120 U.S. 68 (1887). If peremptory challenges were eliminated, and the jury filled with the first 12 individuals to survive challenges for cause, an undeniably impartial selection procedure could well result in a jury totally unacceptable to one or both parties, and rightly viewed with suspicion by the community at large. Or, as the Fifth Circuit put it, "A cross-section of the fair and impartial is more desirable than a fair cross-section of the prejudiced and biased." *Smith v. Balkcom*, 660 F.2d 573, 583 (5th Cir. 1981).

The composition of petitioner's own venire illustrates the instability of a single sample as an exemplar of a population. Only two out of 40 venire members were black. The 1980 census showed Cook County to be approximately 25% black. The northern part of the county, from which petitioner's venire was drawn, has a relatively higher white population than the county as a whole (petitioner offered no data about the racial composition of the registered voter pool for any part of the county), but blacks may still have been underrepresented on petitioner's venire—due to chance, not to systematic exclusion. And, a jury of 12 picked at random from petitioner's venire could easily have been all white. The result would be random, and might be impartial, but would not be cross-sectionally representative of either the venire or the jury pool. The "possibility" of a cross-section under any such random draw is of no practical significance. Only over time would one expect juries, venires, or jury pools to approximate the racial composition of the voting population in the geographic area from which the jury pool is drawn.

As an alternative basis for his request that the fair cross-section requirement be extended to the petit jury, petitioner argues for the necessity of a "counterbalancing of views" on the petit jury. (Brief For Petitioner at

15) Counterbalancing of views is a good description of the political process in a democracy, but it has nothing to do with "impartiality"—the requirement of the Sixth Amendment. An "impartial" juror is one who is, *a priori*, "indifferent" as between defense and prosecution. See *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) ("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors.") The term "indifferent" refers to one who is at equipoise between two alternatives; impartiality has never been understood to refer to the netting out of divergent viewpoints. Such a jury would be impartial only in a statistical sense—and not a prospect likely to satisfy the litigants, especially given the unanimity requirement which allows one extreme viewpoint to produce a hung jury. In *Lockhart v. McCree*, 476 U.S. 163, 177-178 (1986), this Court specifically rejected the theory that an "impartial *jury*" was to be obtained by "balancing the various predispositions of the individual *jurors*;" "an impartial *jury* consists of nothing more than *jurors* who will conscientiously apply the law and find the facts." (citation omitted; emphasis in original)

More fundamentally, the theory behind petitioner's impartiality argument is diametrically opposed to the equal protection theory of *Batson*. *Batson* specifically held that "a person's race simply 'is unrelated to his fitness as a juror.' " 476 U.S. at 87, quoting *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J. dissenting). Thus, by hypothesis, a prosecutor could be removing black jurors (trial-related reasons aside) only because of racial prejudice, "a primary example of the evil the Fourteenth Amendment was designed to cure." *Batson*, 476 U.S. at 85. Petitioner here argues that race *does* matter; hence the argument that the Sixth Amendment is violated when

black jurors are removed, leaving fewer of their number on the jury to contribute their unique point of view. What other possible reason can petitioner offer for the proposition that he has "the constitutional right under the Sixth Amendment to the fair possibility his petit jury will contain blacks"? (Petitioner's Brief at 15.)

Presumably petitioner relies on the *Batson* decision to ensure that blacks will not be removed by a prejudiced prosecutor who for some reason is more interested in excluding blacks from civic participation than in empaneling jurors who will give the prosecution's case a fair hearing (the equal protection problem). Assuming (as we must) that the *Batson* decision has been applied to prevent such discrimination and the jury is properly constituted for purposes of the equal protection clause, petitioner also wants a "*Batson* remedy predicated on the Sixth Amendment", Petitioner's Brief at 6, to ensure that the prosecutor will in addition keep a balance of community representatives on the jury. That is, while equal protection *forbids exclusion* on the basis of race, petitioner's Sixth Amendment approach *mandates inclusion* on the basis of race.

Under the present system of jury selection, the jury pool is selected in a way that does not systematically exclude any segment of the community, and venires are drawn from the pool by some system that precludes governmental manipulation of venire composition. From the venire, the parties select their petit jury, with the State constrained from discriminatory selection by the *Batson* decision. The resulting petit jury is both "indifferent" as between the parties and "drawn from a representative cross-section of the community." Petitioner has failed to demonstrate that this system—exactly that *guaranteed* by the Sixth Amendment—in fact *violates* the Sixth Amendment. His argument that the system should be radically

altered by extending the cross-sectional requirement from the jury pool to the petit jury should therefore be rejected.

CONCLUSION

The State of Illinois respectfully requests that this Honorable Court affirm the decision of the Illinois Supreme Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DANIEL HOLLAND,

Petitioner,

v.

ILLINOIS,

Respondent.

On Writ Of Certiorari To
The Supreme Court Of Illinois

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ARGUMENT

I. THE RIGHT: CONTRARY TO STATE CONTENTIONS, PETITIONER'S CONSTITUTIONAL ENTITLEMENT TO THE FAIR POSSIBILITY OF A REPRESENTATIVE COMMUNITY CROSS-SECTION ON HIS PETIT JURY, UNDER WHICH RIGHT THE STATE IS BARRED FROM REMOVING BLACK PROSPECTIVE JURORS THROUGH USE OF PEREMPTORY CHALLENGES ON GROUNDS OF RACE, IS FULLY SUPPORTED BY THE PURPOSE AND MEANING OF THE SIXTH AMENDMENT RIGHT TO TRIAL BY IMPARTIAL JURY

1. Throughout its brief, the State has persistently condemned petitioner's use of the Sixth Amendment right to trial by impartial jury as providing the right to a fair possibility his petit jury will include a representative cross-section of the community so as to bar the State's racial misuse of peremptory challenges to exclude blacks from jury service. The State disapproves of commingling Sixth Amendment rights with Fourteenth Amendment equal protection concerns and would erect an impenetrable wall between them and thereby strictly segregate these related constitutional provisions. Such an effort at isolation is both unnecessary and unrealistic and should be rejected. There are, indeed, as petitioner demonstrated in his opening brief, equal protection benefits from the recognition of the Sixth Amendment right being advocated here and it is foolish to ignore them, on the State's demand, since required by the separate purposes of the rights to trial by jury and equal protection. In fact, petitioner's argument the Sixth Amendment guarantees, under the provision assuring right to trial by impartial jury, the fair possibility that jury is comprised of a community cross-section is well supported by cases and commentators. It should be recognized without the distress suggested by the State as its major disagreement with petitioner's argument.

The State's primary dispute with petitioner's assertion the Sixth Amendment entitles him to the fair possibility his petit jury will include the representative community cross-section is the claim he commingles Sixth Amendment and equal protection concepts. To the State, the Sixth Amendment simply assures an "impartial" set of jurors while the Fourteenth Amendment equal protection provision governs the race discrimination alleged present here. Therefore, since *Batson* v. *Kentucky*, 476 U.S. 79 (1986) provides the exclusive remedy for the equal protection error claimed here, petitioner must adhere to that decision. Of course, being white, petitioner cannot utilize that holding and, so, in essence can do nothing. This inability to apply *Batson* to his own case, by the very terms of the *Batson* decision, disposes of the State's assertion (Br., p. 15) that this Court need not consider the Sixth Amendment approach since a remedy is already available.

In asserting the Sixth Amendment jury trial right, petitioner relies on a guarantee clearly applicable to him. As the State bemoans (Br., pp. 38-40), the Sixth Amendment right to trial by jury applies to every citizen accused of a crime and each is entitled to contend it was not provided in his case. In the case such as here of racial discrimination which serves to deny defendant his constitutional right to a jury trial, there is necessarily some unavoidable spillover of equal protection and Sixth Amendment considerations. In this regard, one commentator sensibly explained this relationship as follows:

> "Clearly, an overlap in the goals achieved by application of the fair cross-section requirement and equal protection analysis exists in the context of jury selection. Both requirements help maintain the general integrity of the judicial system. Both requirements help avoid discrimination against groups

> whose members are prevented from undertaking jury service. But while stopping discrimination directed at groups is the primary goal of applying equal protection analysis, it is only a secondary goal in applying the fair cross-section requirement. The primary rationale for the fair cross-section requirement is not that it protects members of groups but that it protects any individual defendant's right to a fair and impartial jury. The sixth amendment is concerned primarily with the rights of the defendant, not with the rights of those in the group excluded from jury service." (Magid, *Challenges to Jury Composition: Purging the Sixth Amendment Analysis of Equal Protection Concepts*, 24 San Diego L. Rev. 1081, 1112-13 (1987) (hereafter *Challenges*))

Likewise, the connection between these two constitutional sections was equally well summarized in this fashion:

> "Originally, the goal of a jury of one's peers found support in the equal protection clause and its command to eliminate intentional racial discrimination. By the 1970s, however, the *Strauder* [v. *West Virginia*] goal had become the benefactor of a completely different constitutional provision—the sixth amendment right to trial by jury and its essential component, the right to have a jury selected from a fair cross-section of the community. As the Court moved away from the equal protection analysis, the fair cross-section requirement evolved into the sole source of protection for the defendant's interest in a jury of peers. Not until *Batson* did the Court revitalize the concept of reaching the goal of a jury of peers by means of the equal protection clause." (Serr & Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. Crim.L.&Criminology 1, 6-7 (1988) (hereafter *Jurisprudence*))

Thus, both constitutional provisions do share an interest in racial discrimination, with the difference arising in the

degree of that concern. While banning racial discrimination is the "essential" purpose of the equal protection clause, it is a secondary (though worthy) objective of the Sixth Amendment. Instead, "the chief goal of the fair cross-section requirement remains the protection of every defendant, not the protection of only particular groups." (*Challenges*, 24 San Diego L. Rev. at 1114) The benefits to the war against racial bigotry from acknowledgment of the Sixth Amendment right advocated here are considerable. The "recognition of the fair cross-section requirement as applicable to petit juries would combat such discrimination" and "would broaden the anti-discriminatory effect of the *Batson* decision." (Raphael, *Discriminatory Jury Selection: Lower Court Implementation of Batson* v. *Kentucky*, 25 Willamette L. Rev. 293, 348, 294 (1989) (hereafter *Selection*)) But the constitutional assurance on which petitioner relies is the Sixth Amendment right to trial by jury because "only the sixth amendment's fair cross-section analysis and not equal protection analysis can fully protect a defendant's sixth amendment right to a" trial by jury. (Magid, *Challenges*, 24 San Diego L. Rev. 1081 at 1083)

The State insists the *Batson* case is the sole means of combating discrimination, although it admits this holding "is not available to petitioner". (Br. at p. 13) What it doubts is whether discrimination against blacks ever arises in trials of white defendants where the prosecution removes black prospective jurors through use of peremptory challenges and, so, whether this Court should consider using the Sixth Amendment to combat it. (Br., p. 13) In fact, this Court recognized in *Batson*, 476 U.S. 79 at 97 that prosecutors act on the "assumption that blacks as a group are unqualified to serve as jurors" (apart from the assumption of bias "simply because the defendant is

black"). This bias could thus operate in trials of white defendants.

In truth, contrary to State beliefs, "the elimination of blacks from juries is not limited to . . . black defendants" (Doyel, *In Search of a Remedy for the Racially Discriminatory Use of Peremptory Challenges*, 38 Okla.L.Rev. 385, 386 (1985) (hereafter *Search*)) and "[i]nnumerable 'practice manuals' reveal that prosecutors—at least those who accept the conventional cluckings of courthouse corridors—seek to avoid minority jurors whatever the race of the defendant." (Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U.Chi.L.Rev. 153, 187 (Winter 1989) (hereafter *Supreme Court and Jury*)) This Court cannot be "oblivious to the possibility that prosecutors might systematically exclude blacks in cases involving white . . . defendants" (*Supreme Court and Jury*, 56 U.Chi.L.Rev. at 186-7) but must recognize the clear collateral value of fighting remaining vestiges of racial bigotry by applying the Sixth Amendment as argued by petitioner herein and in his opening brief.

Contrary to the State's additional contentions, there is simply more to the Sixth Amendment trial guarantee than impartial jurors.

2. Another State complaint arises from its assumption petitioner is only assured of a right to impartial jurors under the Sixth Amendment and since he offers no complaint his jury was partial, there was no Sixth Amendment violation by the State's use of peremptory challenges on the basis of race to remove all blacks from jury service. Petitioner asserts the State misreads the Sixth Amendment much too narrowly since it assures him jury rights beyond the mere guarantee of impartial jurors

as construed by the State. Furthermore, imposing impartiality in the selection process leading to the trial jury, which the State disapproves (Br., p. 45), also protects valued Sixth Amendment interests and should be endorsed by this Court.

The very fact this Court considered and established the rights to a fair cross-section of the community included in the jury selection process prior to trial (*Taylor* v. *Louisiana*, 419 U.S. 522 (1975); *Duren* v. *Missouri*, 439 U.S. 357 (1979)) and to the fair possibility the petit jury includes representatives of the community (*Ballew* v. *Georgia*, 435 U.S. 223 (1978); *Williams* v. *Florida*, 399 U.S. 78 (1970)) indicates the Sixth Amendment provides for more than a collection of impartial jurors. Were impartiality alone all the Sixth Amendment guaranteed, no basis exists for this Court's holdings on including women in the jury pools and assuring the jury size permitted a representative community cross-section. While the State maintains (Br., p. 28) the "jury size cases" did not extend the concept of a fair cross-section to the petit jury, it has been recognized that, in *Ballew*, "the Court indicated that the fair cross-section applies to the petit jury when it held that a five-person petit jury was unconstitutional because it was too small to represent the community accurately." (Magid, *Challenges*, 24 San Diego L. Rev. 1081, 1089) Assuming impartiality, a jury of four men chosen from a system excluding women could seemingly comprise a constitutional jury in the State's view.

The trial jury must not only be impartial or indifferent as the State reveals (Br., p. 47) but, as the State equally concedes (Br., p. 22), selected from a venire constituting a fair cross-section of the community. The State fails to explain how a system which merely demands indifference to achieve the sole goal of impartiality also demands a

representative cross-section of the community in the jury pool. The very insistence on this cross-section as conceded by the State belies its claim the Sixth Amendment is satisfied merely by indifference. The mere existence of cases such as *Taylor* and *Duren* and *Williams* and *Ballew* demonstrates the fallacy of the State's belief the Sixth Amendment requires indifferent jurors but nothing more. Analysis of the Sixth Amendment right to trial by jury likewise clearly supports the petitioner's assertion he is constitutionally entitled to the fair possibility of a representative cross-section on the panel in his case.

The fundamental nature of the jury trial right secured by the Sixth Amendment was cogently expressed by this Court in *Taylor* v. *Louisiana:*

> "The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." (*Taylor*, 419 U.S. 522 at 530)

By this evaluation, this Court has proclaimed there is more to a jury than the impartiality of its members. For, this Court "has found that the fair cross-section requirement helps achieve the purpose of the jury, which is to 'guard against the exercise of arbitrary power' by making 'available the commonsense judgment of the community.'" (Magid, *Challenges*, 24 San Diego L. Rev. 1081, 1111) Moreover, in his analysis of this view of the jury, Professor Doyel related the 7-Justice majority in *Taylor* determined

> "the purpose of a jury is to guard against the arbitrary exercise of power by an overzealous or mistaken prosecutor. The jury accomplishes this purpose, [Justice] White said, by 'mak[ing] available

> the commonsense judgment of the community.' But the community's judgment is not provided by a jury from which a large, distinctive group has been excluded." (*Search*, 38 Okla. L. Rev. 385, 418))

Thus, the guarantee asserted by petitioner that he possessed the right to the fair possibility for including cognizable community groups in his petit jury is directly related to the heart of the Sixth Amendment jury protection. This Court has certainly "long recognized that the fair cross-section requirement is an essential component of the right to a representative jury" so that if "groups can be excluded arbitrarily from juries, the legitimacy of the jury system is undermined." (Magid, *Challenges*, 24 San Diego L. Rev. 1081 at 1114, 1112) Petitioner's argument that removal of the black prospective jurors here by State misuse of peremptory challenges on racial grounds is thus based squarely on the Sixth Amendment's jury trial right, a right which extends beyond the mere limits of impartiality of the jurors.

While the State refers to the discussion of impartiality in *Lockhart* v. *McCree*, 476 U.S. 162 (1986) (Br., p. 47), this Court there never reduced the Sixth Amendment to mere impartiality but, instead, analyzed the meaning of the constitutional right to impartial jurors. As petitioner offers no argument the jurors were partial in violation of the Sixth Amendment, this Court need not valuate the application of *Lockhart* to this case. Instead, it should analyze whether in removing by peremptory challenge all blacks called for jury service the State has disrupted petitioner's Sixth Amendment right to the fair possibility he would obtain a jury comprising a fair cross-section of the community and, thereby, has frustrated the underlying purposes of a trial by jury.

It should likewise accept impartiality as significant in the selection of that jury. It has been recognized that

when this Court extended the Sixth Amendment right to trial by jury to States, it "focused not on fundamental rights but fundamental *processes*." (Druff, *The Cross-Section Requirement and Jury Impartiality*, 73 Cal. L. Rev. 1555, 1580 (1985) (hereafter *Cross-Section*); emphasis by the author) It is thus only sensible this Court insist on an impartial process of jury selection so that, in this sense, a procedure that allows a prosecutor to exclude all black venire-persons without any reason for the exclusion other than race appearing in the record does not comport with the Sixth Amendment impartiality requirement.

Petitioner maintains this fair possibility right does indeed exist under the Sixth Amendment and appears violated here so as to require a hearing on the issue.

3. The State also quarrels with the various cases petitioner has presented which support his argument the State violated his Sixth Amendment right to trial by jury by removing all blacks by peremptory challenge and frustrating the fair possibility his petit jury would contain a representative cross-section of the community. (Br., pp. 13-15) The main complaints raised by the State relate to the cases arising prior to *Batson* and using a mixture of the jury trial and equal protection right simply as a means to overcome *Swain*. The fact some of the cases appeared before *Batson* was decided is irrelevant. Other cases have been decided since *Batson* and have, as petitioner advocated, utilized the Sixth Amendment to find constitutional error in the State's racial use of peremptory challenges to strike blacks from the jury. (*Seubert* v. *State*, 749 S.W.2d 585 (Tex. App. 1988); *State* v. *Superior Court*, 157 Ariz. 541, 760 P.2d 541 (1988); *Fields* v. *People*, 732 P.2d 1145 (Colo. 1987)) Despite its general claim, the State makes no particularized reference to any portion of

any decision which improperly mixes jury trial and equal protection considerations (which, as noted herein, are somewhat related anyway). And as to the motives for the decisions, they were well-summarized in the following form:

> "Most of the courts that have applied the fair cross-section analysis to the petit jury indicated that they were doing so for the two reasons: (1) because a defendant's sixth amendment rights were being violated and (2) because equal protection analysis, especially when the systematic exclusion requirement of *Swain* was applied, would not protect the defendant." (Magid, *Challenges*, 24 San Diego L. Rev. 1081 at 1094)

Thus, apart from circumventing *Swain* (even assuming that be a defect which the State has not explained), the cases were motivated by violations of the Sixth Amendment. Given this and the soundness of the Sixth Amendment analysis in the decisions, the State's criticism is unpersuasive. It acknowledges the cases did use the Sixth Amendment (Br., p. 14, 14 n. 1) and, in fact, "[n]early all of the cases relied at least in part upon United States Supreme Court decisions incorporating a representative cross-section-of-the-community analysis into the sixth amendment guaranty of trial by impartial jury." (Doyel, *Search*, 38 Okla.L. Rev. 385, 417) Therefore, they continue to provide encouragement to this Court to utilize, as advocated, the Sixth Amendment to find unconstitutional the misuse of the State peremptory challenges to destroy the fair possibility of a representative cross-section of the community on the petit jury.

4. The State questions the petitioner's acceptance of the mere "possibility" his jury reflects the community consensus (Br., p. 30 n. 3) and notes the only sure way to achieve a cross-sectional requirement "is to have a cross-

section actually present on each petit jury." (Br. at p. 32) It equally complains of the problems it faces if it must ensure the venire represents the community so that the petit jury represents the community (Br. at p. 34) and it charges "petitioner's Sixth Amendment approach" with mandating inclusion of blacks on a jury. (Br., p. 48) It flatly supposes that, accepting petitioner's argument, the Sixth Amendment commands empanelled juries "actually mirror the composition of the community." (Br., p. 28) These criticisms misperceive the nature of the rights and procedures involved in the jury selection system under the Sixth Amendment.

Although the State chides petitioner for seeking too little (just a fair possibility of the community cross-section on the petit jury rather than a guarantee), it equally notes, as petitioner recognized, petitioner has no constitutional right to place community groups on his trial jury. (Br., p. 32) It is certainly nonsensical for petitioner to seek that to which he is not entitled.

However, inclusion is constitutionally mandated but at the appropriate time. Under accepted procedural arrangements, all community segments are included in the jury pool listings. Therefore, at that time, there is indeed the affirmative burden on the State authorities to place community groups on the jury rolls. That jury list thus must reflect the full cross-section of cognizable groups in that society. Under the constitution as interpreted by this Court, the State may not deliberately evade its responsibility to include the representative community cross-section on these lists. This Court thereby assures that, at the outset, the jury pools of the local government will reflect that community's cross-section. Thereafter, the system's random selection of potential jurors for the venire creates the continued fairness essen-

tial to its existence. Citizens have at least the assurance of the fair possibility members of cognizable groups on the jury pool will reach the jury venire. By this case, this Court should insist the citizens have the same assurance of the fair possibility members of particular groups in society on the jury venire reach the only crucial body in the whole selection process—the petit jury itself. Petitioner seeks in the selection of his trial jury the same insulation from wrongful official interference which now governs the selection of the venire.

There is normally no opportunity for impermissible disruption in selecting the venire as that occurs totally at random. Since the petit jury is not chosen at random but through voir dire, there is the potential for State misconduct in its improper removal of potential jurors otherwise available for jury service. That misconduct (racial misuse of peremptory challenges) is the maleficence to be condemned and outlawed here. No community groups must be on the venire but the random selection process assures the fair possibility they might be. No representative community group must be on the petit jury but the ban on misapplied State peremptory challenges assures they might be. Not only is such a demand reasonable, it is necessary. The State's concerns on including group members by some affirmative quota system are thus baseless and need not be regarded.

Contrary to State accusation (Br., p. 19), petitioner does not seek "to alter the system protected by the Sixth Amendment". Rather, he seeks to assure to all citizens trial by a system as required by the constitution and intended by this Court. This is done by recognizing (1) the initial affirmative burden to include without exception all community groups on the jury rolls, (2) the random selection thereafter of potential jurors on the venire (assuring

thereby the fair possibility members of cognizable groups will be included), and (3) the restriction on improper exclusion of members of those distinctive groups in the voir dire process so as to, again, assure the fair possibility they will eventually serve on the petit jury. This is the system guaranteed by the Sixth Amendment (not the current flawed one endorsed by the State, (Br., p. 48)) There is no radical alteration as the State assumes (Br., pp. 48-9) In fact, this Court need only conclude, as petitioner has argued, that the Sixth Amendment bars the prosecutor's racial use of peremptory challenges to remove blacks from the jury and thereby destroy the fair possibility blacks will participate as petit jurors. In this way, as the State seeks, the constitutional command is made operational and, therefore, fully enforceable (Br., p. 29) and the Sixth Amendment principles followed consistently to their logical conclusion. (Br., p. 19)

5. The State further expresses concern on the groups in question whose removal by peremptory challenge would permit the complaint of Sixth Amendment violation, perhaps to raise fears of the consequences of this case. (Br., pp. 24-5, 25-6) The State simply does not believe (Br., p. 25) the principled approach to this issue can be limited to the facts here presented: removal of blacks from the jury in the trial of a white defendant. Regardless of the State's imagined extension of a holding in this case in petitioner's favor, this Court need only decide the question arising from these facts: the State's removal for racial reasons of black prospective jurors from a white defendant's trial jury frustrates the fair possibility a representative cross-section of the society will be included on that jury to express the community's commonsense judgment.

If, in the future in another case in another court in another context, another defendant wishes to apply this

law, he will have the burden of proving the group excluded and, so, unrepresented is a cognizable one in that community. (In any event, this Court has seemed willing to permit a flexible and fluid application of the law since, as recognized by the State (Br., p. 24), it noted in *Taylor* v. *Louisiana*, 419 U.S. 522 at 537 that communities differ so that a fair cross-section in one locale and time might not dictate another community's fair cross-section requirements.) This case involves the recognized cognizable group of blacks so that, as in *Lockhart*, 476 U.S. 162 at 174, there is no necessity to now define the distinctive groups about whose peremptory removal a defendant may complain.

6. The State also complains petitioner "says nothing about whether defendant is constrained" in his use of peremptory challenges during voir dire (Br., p. 40) and dwells on the prosecutor's possible ability to complain under the Sixth Amendment of the defense counsel's misuse of peremptory challenges. (Br., pp. 40-2) Whether this is some tacit endorsement of applying the Sixth Amendment to ban racial misuse of peremptories by prosecutors so prosecutors can object themselves is not made clear. But the simple explanation for petitioner's silence on this matter is its absence as an issue in this case. No complaint was made in the trial court by the State nor did it raise as an issue on appeal the defense counsel's racial misuse of his peremptory challenges to exclude black potential jurors. (Defense counsel in fact did not exclude any black prospective jurors in this case.) Thus, there is no record here on which to determine the need to apply the Sixth Amendment ban on racially-motivated peremptory challenges to defense attorneys.

In any event, the State offers little concrete authority for its assumption constitutional symmetry is mandated

by the Sixth Amendment. (It does not argue the equal protection clause of the Fourteenth Amendment provides it any grounds to object to defense peremptory challenges and this Court therefore has been given no basis to utilize that constitutional provision to restrict defense peremptories.) The assumption of symmetry has been challenged recently by analysts as an inadequate constitutional reason to limit the exercise of peremptory challenges by defense attorneys.

Professor Katharine Goldwasser, in her article in the Harvard Law Review, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 Harv.L.Rev. 808, 825 (1989) reports, with citations, that

> "A few courts have considered—and have uniformly rejected—the argument that principles of fairness require symmetrical treatment of the opposing parties in a criminal case.
>
> * * *
>
> "No one would argue against fairness to both sides in a criminal trial. But any argument that our criminal justice system equates fairness with symmetry would be equally untenable."

Upon analysis (102 Harv.L.Rev. at 826-40), Professor Goldwasser concluded "prosecution and defense peremptories ought to be treated differently" (102 Harv.L.Rev. at 826) and, since "imposing *Batson*-like limitations on defendants would, in fact, jeopardize the fairness of criminal trials, defense peremptories should be left alone." (102 Harv.L.Rev. 808, 840)

Similarly, Professor Susan Bandes explored the concept of State's rights in *Taking Some Rights Too Seriously: The State's Right to a Fair Trial*, 60 So.Cal.L.Rev. 1019 (1987). In doing so, she considered

and rejected "the assumption that the state also possesses trial-related rights which are equal in weight to those of the accused." (60 So.Cal.L.Rev. at 1019) She noted distortions from "the incorrect assumptions that the state must be treated equally with the accused" (60 So.Cal.L.Rev. 1019 at 1056), stressing the "Constitution makes no mention of the state's right to a fair or impartial trial." (60 So.Cal.L.Rev. at 1022-3) Thus, the true purpose of the Sixth Amendment right to trial by jury is not to aid the State but (as with other sections of the federal Bill of Rights) "to redress the inherent imbalance between the 'awesome power' of the state and the unprotected position of the individual accused of crime." (60 So.Cal.L.Rev. at 1025; emphasis removed) This same inability of the State to rely on Sixth Amendment trial rights to diminish defense peremptories appears elsewhere in current legal literature (see Note, *Defendant's Discriminatory Use of the Peremptory Challenge After Batson* v. *Kentucky*, 62 St. John's L. Rev. 46, 59-60, 66 (1987); Comment, *The Prosecutor's Right to Object to a Defendant's Abuse of Peremptory Challenges*, 93 Dick.L.Rev. 143, 153 (1988)) and this Court should not now so utilize the Sixth Amendment to create such a State right, especially considering the lack of authority for it offered by the State in its brief. If anything, as the above law review note and comment recognize (93 Dick.L.Rev. 143, 152; 62 St. John's L. Rev. 46 at 66), any restrictions on defense peremptories cannot be imposed by courts on constitutional grounds of Sixth Amendment symmetry but should be limited to statutory provisions enacted by local legislatures.

Accepting petitioner's contention the Sixth Amendment assures him the State will not frustrate his jury trial right to the fair possibility of a representative community cross-section on his petit jury does not compel extending

this right to the State, at least not in this case. This record lacks both the factual and legal challenges appropriate for resolving the issue of the State's Sixth Amendment rights. Therefore, this Court should simply determine the petitioner's Sixth Amendment rights (not those of the State) and find him entitled to a ban on the State's interference through its peremptory challenges with the fair possibility of blacks, a cognizable community group intended to convey the commonsense judgment of the local society, on his petit jury.

ARGUMENT

II. THE REMEDY: CONTRARY TO STATE ASSERTIONS, THE CONSTITUTIONAL ERROR OF DEPRIVING PETITIONER OF HIS SIXTH AMENDMENT RIGHT TO THE FAIR POSSIBILITY OF A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY ON HIS PETIT JURY IS DETERMINED ACCORDING TO THE STANDARDS OF *BATSON* v. *KENTUCKY* RATHER THAN *DUREN* v. *MISSOURI*

1. Petitioner maintained in his opening brief that, since the State misconduct at issue here occurred during selection of his trial jury, the standards of *Batson* v. *Kentucky*, 476 U.S. 79 (1986) would be appropriate. The State responds (arguing on the absence of the right advocated here) that the proper criteria are reflected in *Duren* v. *Missouri*, 439 U.S. 357 (1979), unmet here, and questions why this "conventional Sixth Amendment standard" is inapplicable. (Br., pp. 30, 32, 35) In fact, its applicability is limited (as was the factual situation in *Duren*) to pretrial stages of jury selection and it has no sensible function during voir dire.

The perspective on this point was presented in *Cross-Section*, 73 Cal.L.Rev. 1555, where it was recognized the "elements of a prima facie violation *in the early stages* of

selection were detailed in *Duren*". (73 Cal.L.Rev. 1555, 1561; emphasis added) Thus, the *Duren* analysis has no appropriate place in the later, trial, stage of jury selection. The two stages (pre-trial and voir dire) are distinguishable and, therefore, so are the appropriate standards for judging a violation.

It was emphasized in *Cross-Section* that this Court in *Duren* required "that the selection of veniremembers must be *random* so that the pattern of venires over time will be representative." (73 Cal.L.Rev. 1555 at 1568; emphasis by author) However, since "[b]oth counsel and the court exercise a necessary element of discretion in the process of striking veniremembers", "the standard for the earlier stages of selection, with its emphasis on randomness, cannot apply" to voir dire. (73 Cal.L.Rev. 1555, 1566) The "inappropriateness of applying" *Duren* to the voir dire process arises "from the fact that peremptory challenges are presumably nonrandom." (73 Cal.L.Rev. at 1568) This is certainly a persuasive reason for restricting *Duren* to its facts of determining error in pretrial jury proceedings.

In this regard, the reviewing court in *McCray* v. *Abrams*, 750 F.2d 1113, 1131 (2nd Cir. 1984) succinctly concluded it was "evident that the second factor stated by the *Duren* Court, *i.e.*, that the resulting group was in fact not representative of the community, is not applicable to the petit jury stage." That is truly the situation and, since the evaluation of the exclusion of jurors during pre-trial selection procedures significantly differs from the evaluation of exclusion during voir dire, the standards sensibly differ as well. The State has failed to justify application of pre-trial standards (in *Duren*) to the selection of the petit jury and, therefore, use of *Duren* here (either to reject the right or provide the remedy) should be refused.

Rather, because "[t]he fair cross-section analysis is somewhat different when used to limit peremptory challenges at the petit jury level", the defendant would simply need to "show that a substantial likelihood exists that the challenges leading to the exclusion of a group were made on the basis of group affiliation rather than because of an individual's possible inability to fairly decide the case." (Magid, *Challenges*, 24 San Diego L. Rev. 1081 at 1088-9) Since intended by this Court to permit a meaningful analysis of the question of whether the State misused its peremptory challenges to remove black prospective jurors during voir dire, it is appropriate to utilize the *Batson* standards to evaluate Sixth Amendment trial violations. It is criteria with which trial courts are familiar, can be easily used in trials with both black and white defendants, and even the State admits *Batson* "can be usefully applied in the context of a single trial". (Br. at p. 34) Upon recognizing the Sixth Amendment right here proposed of a ban on State interference with the fair possibility a representative community cross-section expressing commonsense judgment will appear on a petit jury, this Court should sensibly conclude the appropriate standards for evaluating any violation of this right are the voir dire criteria of *Batson* v. *Kentucky*.

2. The State complains, based on *Duren*, of hardships in withholding consideration of the challenged State jury selection misconduct until the close of voir dire. (Br., pp. 35-6) Since, as noted herein, *Duren* is not the controlling case on appropriate trial court procedures, there is no concern as assumed by the State. Rather, the parties and trial court will proceed as intended by this Court in *Batson*, a system already deemed appropriate for review of misused peremptory challenges.

Even should a judge, however, delay consideration of the matter to the end of voir dire, that has been viewed as

"the best time for the trial judge to properly address the issue" and "the most logical and judicially economical time" since only then will the trial judge "have before him the necessary information on which to base the prima facie determination." Seer & Maney, *Jurisprudence*, 79 J.Crim.L.&Criminology 1 at 20, 21 n 114) Trial courts remain free to apply the standards sensibly under the circumstances of the particular case and there is no need to credit the State's unwarranted alarm here. Instead, this Court should simply declare, as petitioner argued in his opening brief, the *Batson* remedy is a suitable procedure for evaluating claimed Sixth Amendment constitutional error in the State's misuse of its peremptory challenges.

CONCLUSION

Wherefore, petitioner respectfully requests, for the reasons asserted herein, this Honorable Court reject the contentions of the State and, as argued in his opening brief, order a hearing on the State's unconstitutional use of its peremptory challenges.

Respectfully submitted,

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August, 1989

No. 88-5050

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DANIEL HOLLAND,

Petitioner,

—v.—

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF *CERTIORARI* TO THE SUPREME COURT OF ILLINOIS

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, ACLU OF ILLINOIS, AND NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Is the fair cross-section requirement of the Sixth Amendment violated by a prosecutor's use of peremptory challenges to exclude Black jurors solely on account of their race?

2. Does a prosecutor's use of peremptory challenges to exclude Black jurors solely on account of their race violate the Sixth Amendment only if the defendant is also Black?

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INTEREST OF AMICI*/

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization with over 250,000 members dedicated to the principles of liberty and equality embodied in the Constitution and civil rights laws of this country. The ACLU of Illinois is one of its state affiliates.

As part of its commitment to legal equality, the ACLU has long opposed any and all forms of racial discrimination in the administration of justice. Of particular relevance here, the ACLU represented petitioner in McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984), vacated and remanded, 478 U.S. 1001 (1986), the first federal case holding that a prosecutor's use of

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*/ Pursuant to Rule 36.2, letters of consent to the filing of this brief have been lodged with the Clerk of the Court.

peremptory challenges to screen prospective jurors on the basis of race violates the Sixth Amendment.

The NAACP Legal Defense and Educational Fund, Inc., is a nonprofit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Blacks to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid without cost to Blacks suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. For many years, its attorneys have represented parties and have participated as amicus curiae in this Court and in the lower federal courts in cases involving many facets of the law.

The Fund has a long-standing concern with the issue of exclusion of Blacks from service on juries. Thus, it has raised jury discrimination claims in appeals from criminal convictions,[1] pioneered in the affirmative use of civil actions to end discriminatory practices[2] and, indeed, represented the petitioner in Swain v. Alabama, 380 U.S. 202 (1965), the case which first raised the issue of the use of peremptory challenges to exclude Blacks from jury venires.

More recently, both the ACLU and the Fund participated as amicus curiae in Batson v. Kentucky, 476 U.S. 79 (1986), and

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1/ E.g., Alexander v. Louisiana, 405 U.S. 625 (1972).

2/ Carter v. Jury Commission, 396 U.S. 320 (1970); Turner v. Fouche, 396 U.S. 346 (1970); Mitchell v. Johnson, 250 F.Supp. 117 (M.D.Ala. 1966).

Teague v. Lane, 109 S.Ct. 1060 (1989), two cases that raised issues similar to the issues presented here.

STATEMENT OF THE CASE

The petitioner in this case was convicted by an all-white jury after the prosecutor used his peremptory challenges to exclude the only two potential Black jurors. Petitioner objected to those exclusions both at trial and on appeal. His objections were rejected by the Illinois state courts at every stage.

Most significantly, the Illinois Supreme Court ruled that petitioner did not have standing to raise a Batson claim because he is white and the excluded jurors were Black. People v. Holland, 121 Ill.2d 136, 157 (1988). The Illinois Supreme Court also rejected petitioner's Sixth

Amendment claim on the ground that the fair cross-section requirement of the Sixth Amendment does not apply to the petit jury. Id. at 158.

SUMMARY OF ARGUMENT

Under the Sixth Amendment, every criminal defendant has the constitutional right to be tried before an impartial jury drawn from a fair cross-section of the community. Contrary to the view of the court below, this fair cross-section requirement does not apply only to the jury venire. Indeed, any such limitation would be illogical and self-defeating.

The only function of the jury venire is to serve as a pool from which petit juries are chosen. The only reason for insisting that the jury venire reflect a fair cross-section of the community is to

maximize the possibility that petit juries chosen from that pool will be similarly representative.

That possibility may not always ripen into reality. In individual cases, the process of random selection and non-racial exclusion may produce all-white or all-Black juries. For both practical and principled reasons, therefore, the Constitution does not guarantee proportional representation on the petit jury, nor does petitioner seek that result. It is quite another thing, however, when the government uses its peremptory challenges as part of an intentional strategy to exclude potential jurors solely because of their race. There is no state interest that supports such behavior, as this Court properly recognized in Batson v. Kentucky, 476 U.S. 162 (1986).

While Batson obviously rested on equal protection grounds, the government's deliberate misuse of its peremptory challenges is also inconsistent with the underlying purposes of the fair cross-section requirement. Indeed, this Court has invoked the fair cross-section requirement on several occasions to strike down other efforts by the government to distort the jury selection process based on impermissible criteria. The analysis in this case should be precisely the same.

The fact that the petitioner in this case is white and the excluded jurors were Black should have no bearing on the outcome. The values served by the fair cross-section requirement do not turn on the racial or sexual identity of the defendant. Thus, in Taylor v. Louisiana, 419 U.S. 522, 526 (1975), this Court specifically upheld

a male defendant's standing to challenge the exclusion of female jurors on fair cross-section grounds.

The decision in Taylor effectively resolves the standing issue in this case. More generally, however, amici believe that the rationale of Taylor should apply in any case involving discriminatory jury selection, regardless of the constitutional theory on which the case proceeds. As this Court observed in Peters v. Kiff, 407 U.S. 493, 498 (1972), "[t]he exclusion of Negroes from jury service, like the arbitrary exclusion of any other well-defined class of citizens, offends a number of related constitutional values." Not the least of these is the interest of the excluded juror, who has no other practical way to voice her complaint except through the medium of the defendant.

Amici acknowledge, of course, this Court's reference in Batson to a criminal defendant's right to challenge potential jurors "of the defendant's race." 476 U.S. at 96. In light of contrary precedent, however, amici respectfully suggest that this reference can best be understood as an allusion to the facts of Batson and not a statement of the controlling law, even in equal protection cases.

ARGUMENT

I. A PROSECUTOR'S USE OF PEREMPTORY CHALLENGES TO EXCLUDE POTENTIAL JURORS SOLELY ON ACCOUNT OF RACE VIOLATES THE FAIR CROSS-SECTION REQUIREMENT OF THE SIXTH AMENDMENT

The principal issue in this case is whether a prosecutor's use of peremptory challenges to exclude potential jurors on the basis of race violates the fair cross-section requirement of the Sixth Amend-

ment.3/ Four members of this Court expressed their views on that subject only a few weeks ago in Teague v. Lane.4/ All four agreed with Justice Stevens, who wrote:

> It is clear to me that a procedure that allows a prosecutor to exclude all black venirepersons, without any reason for the exclusions other than their race appearing in the record, does not comport with the Sixth Amendment's impartiality requirement.

109 S.Ct. at 1079 n.1. See also, id. at 1079 (Blackmun, J.); id. at 1091-92 (Brennan and Marshall, JJ.).

This Court's decisions fully support that conclusion. Indeed, this Court has

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3/ The jury trial provisions of the Sixth Amendment were applied to the states through the Fourteenth Amendment in Duncan v. Louisiana, 391 U.S. 145 (1968).

4/ Because of its holding on the scope of habeas relief, the majority opinion expressly declined to address the Sixth Amendment question presented in Teague. 109 S.Ct. at 1069.

repeatedly stressed that "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." Taylor v. Louisiana, 419 U.S. at 528.

Thus, in Smith v. Texas, 311 U.S. 128, 130 (1940), the Court declared that the exclusion of racial groups from jury service was "at war with our basic concepts of a democratic society and a representative government." In Ballard v. United States, 329 U.S. 187, 191 (1946), the Court relied on a federal statutory "design to make the jury 'a cross-section of the community,'" in reversing a conviction by a jury from which all women had been excluded. In Brown v. Allen, 344 U.S. 443, 474 (1953), the Court asserted that jury lists must "reasonably reflect[s] . . . a cross-section of

the population suitable in character and intelligence for that civic duty." And in Williams v. Florida, 399 U.S. 78, 100 (1970), the constitutional validity of a six-person jury was upheld on the ground that it was both "large enough to promote group deliberation . . . and to provide a fair possibility for obtaining a representative cross-section of the community."

Summarizing this case law in Taylor, the Court declared:

> We accept the fair-cross-section as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power -- to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor . . . This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system . . . "[T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility." Thiel v. Southern Pacific Co., 328 U.S. 217, 227 (1946)(Frankfurter, J., dissenting).

419 U.S. at 530-31.

The requirement of a fair cross-section in jury selection has also been adopted by statute as "the policy of the United States."5/ The basis for this

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5/ See Federal Jury Selection and Service Act of 1968, 28 U.S.C. §§1861, et seq. Section 1862 provides:

> No citizen shall be excluded from jury service as a grand or petit juror . . . on account of race, color, religion, sex, national origin, or economic status.

See also, Uniform Jury Selection and Service Act, §2 (National Conference of Commissioners on Uniform State Laws, 1970).

"policy" was set forth in the accompanying House Report:

> It must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it. As long as there are significant departures from the cross sectional goal, biased juries are the result -- biased in the sense that they reflect a slanted view of the community they are supposed to represent.

H.R.Rep. No. 1076, 90th Cong., 2d Sess. 8 (1968), quoted in Taylor v. Louisiana, 419 U.S. at 529 n.7.

Respondent does not quarrel with this general proposition. Instead, the state argues that the fair cross-section requirement applies only to the jury venire and not to the jury panel. This Court has never adopted that proposition, at least in the very broad sense that respondent now urges it. To the contrary, this Court has often referred with approval to the fair

cross-section requirement in cases dealing solely with the composition of the petit jury.

For example, in Ballew v. Georgia, 435 U.S. 223 (1978), this Court held that a five-person jury was too small to represent the community's judgment in a meaningful way -- in part because a five-person jury threatened "the representation of minority groups in the community," id. at 236 -- although there was no indication that the jury venire was in any way defective or unrepresentative.

Similarly, in Witherspoon v. Illinois, 391 U.S. 510 (1968), the Court struck down a legislative scheme that permitted the prosecution to challenge for cause any potential juror opposed to the death penalty. In Witherspoon, as in Ballew, the concern focused clearly on the jury panel

rather than the jury venire. See also Apodaca v. Oregon, 406 U.S. 404, 410-11 (1972); Williams v. Florida, 399 U.S. 78, 100 (1970).6/

That focus is plainly correct. The point of demanding a representative jury pool is to maximize the chance of obtaining a representative jury. McCray v. Abrams, 750 F.2d at 1124-25. The intentional exclusion of potential jurors on the basis of race, whether in the process of compiling a jury pool or selecting a jury panel, is equally destructive of this constitutional goal.7/ "[T]he State may

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6/ For a careful analysis of this Court's Sixth Amendment decisions, see McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984), vacated and remanded, 106 S.Ct. 3289 (1986).

7/ Another goal of the fair cross-section requirement recognized in Taylor is to promote "public confidence in the fairness of the criminal justice system." 419 U.S. at 530. Such confidence (continued...)

not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at 'other stages in the selection process.'" Batson, 476 U.S. at 88.

Amici do not suggest that the jury chosen in any particular case must faithfully duplicate the demographic profile of the surrounding community. See Teague v. Lane, 109 S.Ct. at 1090-91 (Brennan, J., dissenting). As this Court has held, "[d]efendants are not entitled to a jury of any particular composition." Taylor v. Louisiana, 419 U.S. at 538. But the constitutional imperative of an impartial jury drawn from a fair cross-section of the community that Taylor endorsed is undenia-

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7/ (...continued)
is unlikely to be felt by a minority community that observes the systematic exclusion of every Black juror through the prosecutor's use of peremptory challenges.

bly frustrated by the prosecutor's use of peremptory challenges to exclude potential jurors on the basis of race alone.[8/]

Lockhart v. McCree, 476 U.S. 162 (1986), is not to the contrary. Fairly read, the statement in Lockhart that "extension of the fair-cross-section requirement to petit juries would be unworkable and unsound," id. at 174, only rejected the notion of proportional representation on the petit jury. It did not reject, or even address, the claim presented by petitioner here.

8/ "When the prosecution employs its peremptory challenges to remove from jury participation all Negro jurors, the right guaranteed in Taylor is denied just as effectively as it would be had Negroes not been included on the jury rolls in the first place." Harris v. Texas, 467 U.S. 1261, 1262 (1984)(Marshall, J., dissenting from the denial of certiorari).

Indeed, shortly after Lockhart was announced, this Court vacated and remanded the decisions in Abrams v. McCray, 478 U.S. 1001 (1986), and Michigan v. Booker, 478 U.S. 1001 (1986) -- two cases holding that the discriminatory use of peremptory challenges violates the Sixth Amendment -- without even mentioning Lockhart.[9/] Furthermore, the Sixth Amendment rulings in McCray and Booker were reaffirmed on remand and, in each case, this Court subsequently declined review. See Booker v. Jabe, 801 F.2d 871 (6th Cir. 1986), cert. denied, 479

9/ Both cases were remanded "for further consideration in light of" Batson and the retroactivity ruling in Allen v. Hardy, 478 U.S. 255 (1986). Chief Justice Burger filed a dissenting opinion from the remand order in Booker, in which he argued that its Sixth Amendment holding should be summarily reversed. 478 U.S. at 1001-02. Even Chief Justice Burger, however, did not mention Lockhart as the basis for his conclusion. Moreover, no other member of the Court joined in his opinion.

U.S. 1046 (1987); Roman v. Abrams, 822 F.2d 214, 224-27 (2d Cir. 1987), cert. denied, ___ U.S. ___, 57 U.S.L.W. 3570 (Feb. 27, 1989).

The flaw in respondent's reliance on the rule against proportional representation is best illustrated by example. Assume a county that is 20% Black and that has a jury roll that is also 20% Black. In trial #1, 20 potential jurors are randomly selected, one of whom is Black, a result well within the range of probability. That single Black is then excused for a valid, racially-neutral reason. The resulting, all-white jury does not violate the Sixth Amendment, and neither petitioner nor amici have ever claimed otherwise.10/

10/ It is in this narrow sense that the majority in Teague distinguished this Court's reliance on statistical comparisons in Duren v. Missouri, 439 (continued...)

In trial #2, twenty potential jurors are once again chosen through a process of random selection. This time, four of the selected jurors are Black, or 20%. Utilizing neutral criteria, two of the Blacks are excused from jury service. Not content with that outcome, our hypothetical prosecutor then challenges the remaining two Black jurors on racial grounds, thus affirmatively creating an unrepresentative jury.

10/ (...continued)
U.S. 357 (1979), to establish a violation of the fair cross-section requirement with regard to the jury venire. 109 S.Ct. at 1070 n.1. The inappropriateness of statistical evidence in certain contexts, however, has never meant that discrimination cannot be proved in other ways. Cf. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Indeed, that recognition formed the basis for this Court's decision in Batson. There is no apparent reason why the evidentiary rules should be any different in a Sixth Amendment case.

Under any reasonable interpretation of the Sixth Amendment, this invidious manipulation of the jury system must be deemed unconstitutional. To rule otherwise would mean that the Sixth Amendment guarantees little more than the right of Blacks and other minorities to be summoned for jury duty and then summarily dismissed because of their race. The constitutional framers could not have intended such a hypocritical result.

II. A DEFENDANT'S RACE SHOULD NOT DETERMINE HIS STANDING TO CHALLENGE A VIOLATION OF THE FAIR CROSS-SECTION REQUIREMENT

In holding that a white defendant lacks standing to object to the discriminatory exclusion of Black jurors, the Illinois Supreme Court made two fundamental errors. First, its judgment that a white

defendant suffers no injury-in-fact when Black jurors are excluded necessarily rests on precisely the sort of racial stereotyping that this Court rejected as improper in Batson. Second, its decision implicitly assumes that the defendant's interest is the only interest of constitutional magnitude in assessing the impact of an unrepresentative jury. This Court has never taken such a narrow view of the jury's role in the administration of justice.

Having begun with false premises, it is hardly surprising that the Illinois Supreme Court ultimately reached a conclusion that directly conflicts with explicit rulings of this Court on the standing question. Specifically, in Peters v. Kiff, 407 U.S. 493, 504 (1972), the Court held that

> whatever his race, a criminal defendant has standing to challenge the system used to select his grand or

> petit jury, on the ground that it arbitrarily excludes from service the members of any race . . . .

Likewise, in Taylor v. Louisiana, this Court upheld the right of a male defendant to challenge the exclusion of women from jury service, stating:

> Taylor was not a member of the excluded class; but there is no rule that claims such as Taylor presents may be made only by those defendants who are members of the group excluded from jury service.

419 U.S. at 526.

The distinction that the Illinois Supreme Court drew for standing purposes between white and Black defendants only makes sense if one assumes that jurors are more likely to vote their race than their conscience. Operating on that assumption, the court below appeared to believe that a white defendant's chance for acquittal actually increased (or at least did not

diminish) by the exclusion of potential Black jurors. Thus, the court implied, a white defendant has nothing to complain about under those circumstances.

It is just as inappropriate, however, to base standing doctrine on racial stereotypes as it is to base a prosecutor's use of peremptory challenges on racial stereotypes. As Batson makes clear:

> Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial. A person's race simply "is unrelated to his fitness as a juror."

476 U.S. at 87 (citations omitted).

Once jurors are seen as individuals rather than members of a racial group, it is impossible to sustain the facile assumption that a white defendant can never be harmed by the discriminatory selection of an all-white jury.

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that their exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

Peters v. Kiff, 407 U.S. at 503-04 (footnote omitted).11/

In addition, this Court has repeatedly emphasized that jury discrimination harms not only the accused, but "society as a whole." Rose v. Mitchell, 443 U.S. 545, 556 (1979). "[T]here is injury to the jury system, to the law as an institution, to

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11/ See also Ballew v. Georgia, 435 U.S. at 234 ("the counterbalancing of various biases is critical to the accurate application of the common sense of the community to the facts of any given case").

the community at large, and to the democratic ideal reflected in the processes of our courts." Ballard v. United States, 329 U.S. at 195. Accordingly, the Court in Ballard refused to permit the perpetuation of all-male juries in federal court although acknowledging that the presence of women on the jury "may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded." Id. at 193-94.

The loss of those qualities referred to in Ballard -- whether the challenged exclusion is based on race, religion or sex -- inevitably affects the public perception of justice.

> There is good reason why public confidence in the integrity of the judiciary is diminished whenever invidious prejudice seeps into its processes. This diminution of confidence largely stems from a recognition that the institutions of criminal

> justice serve purposes independent of accurate factfinding. These institutions also serve to exemplify, by the manner in which they operate, our fundamental notions of fairness and our central faith in democratic norms.

Hobby v. United States, 468 U.S. 339, 352 (1984)(Marshall, J., dissenting)(footnote omitted).12/

These important social values are jeopardized by jury discrimination regardless of the defendant's race.13/ Moreover,

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12/ For the excluded juror, the prosecutor's discriminatory exercise of peremptory challenges conveys an official message of second-class citizenship that is even more direct and personal. Over a century ago, this Court observed that jury discrimination denies excluded jurors "the privilege of participating equally . . . in the administration of justice," and thereby places "a brand upon them, affixed by the law; an assertion of their inferiority . . ." Strauder v. West Virginia, 100 U.S. 303, 308 (1880).

13/ See generally, Goldwasser, "Limiting A Criminal Defendant's Use Of Peremptory Challenges: On Symmetry And The Jury In A Criminal Trial," 102 Harv.L.Rev. 808, 835 (1989)("The harm that race-based prosecution peremptories inflict on excluded jurors and the community does not disappear when (continued...)

only the defendant is in a position to protect these social values by objecting to the state's discriminatory jury practices. This Court has recognized as much on numerous occasions:

> It is clear from the earliest cases applying the Equal Protection Clause in the context of racial discrimination in the selection of a . . . jury, that the Court from the first was concerned with the broad aspects of racial discrimination that the Equal Protection Clause was designed to eradicate, and with the fundamental social values the Fourteenth Amendment was adopted to protect, even though it addressed the issue in the context of reviewing an individual criminal conviction.

Rose v. Mitchell, 443 U.S. at 555.

The decision below largely ignores this Court's extensive body of case law discussing the problem of jury discrimina-

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13/ (...continued)
the jurors and the defendant are members of different races").

tion. Its one paragraph discussion on standing relies entirely on a single comment from Batson, which refers to a defendant's right to challenge the exclusion of jurors "of the defendant's race." 476 U.S. at 96.

That comment accurately describes the facts of Batson itself. To elevate it into a controlling principle of law, it is necessary to believe that this Court intended to overrule its decision in Peters v. Kiff without even mentioning it. Nothing in Batson even remotely supports that unlikely interpretation. It is less likely still that Batson intended to overrule the law on Sixth Amendment standing established in Taylor v. Louisiana when the merits of Batson's Sixth Amendment claim were never reached by the Court. 476 U.S. at 85 n.4.

The dispute over standing is more than an academic one. If the defendant does not have standing to object in cases like this one, then nobody does. And unlike many other contexts where the absence of standing means the absence of harm, that is not the case here.

Put in its starkest terms, the practical consequence of the decision below is to condone, in a wide category of cases, the very sort of invidious discrimination that this Court condemned only three years when Batson was decided. Amici urge this Court not to endorse that result.

CONCLUSION

For the reasons stated herein, the decision below should be reversed.

Respectfully submitted,

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